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No. 09-_____

IN THE
Supreme Court of the United States

DAVID R. OLOFSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner was tried and convicted for a violation of 18 U.S.C. sections 922(o) and 924(a)(2), which make it a felony punishable by a fine and up to 10 years imprisonment to knowingly transfer a machinegun as defined in 26 U.S.C. section 5845(b). According to the government's theory of the case, permitted by the trial court, any firearm which fires more than one round per pull of the trigger is a machinegun, "no matter what the cause." The central issue at trial and on appeal concerned the meaning of the term "shoots ... automatically," as applied to a malfunctioning semiautomatic rifle. The questions presented are:

1. Whether the sufficiency of the evidence of the Petitioner's knowledge of the firing characteristics of his semiautomatic rifle was improperly assessed in the courts below by a definition of "automatically" in conflict with the one adopted and applied in Staples v. United States, 511 U.S. 600 (1994)?

2. Whether Petitioner was denied a fair trial by the trial court's refusal to include in its jury instructions the definition of "automatically" set forth in Staples?

3. Whether Petitioner's conviction was obtained at trial and affirmed on appeal based on an inaccurate statement of the law governing the meaning of "automatically" as prescribed in 26 U.S.C. section 5845(b), and incorporated by 18 U.S.C. section 921(a)(23) into 18 U.S.C. section 922(o)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Roland Olofson ("Olofson") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming Olofson's conviction of violating 18 U.S.C. sections 922(o) and 924(a)(2), which prohibit the knowing transfer of a machine gun.

OPINIONS BELOW

On January 8, 2008, at the close of the case, the district court denied Olofson's request that the jury instructions include the definition of "automatic," as stated in Staples v. United States, 511 U.S. 600, 602 n.1 (1994). Record ("R.") 69; Appendix ("App.") 32a-33a. On January 8, 2008, a jury verdict of guilty was entered. R. 70. On May 15, 2008, the district court denied Olofson's motion for acquittal for insufficiency of the evidence. *See* R. 95; Sentencing Transcript ("Sent. Tr.") 21, ll. 10-14. On the same date, the district court entered judgment against Olofson, and imposed a sentence of 30 months imprisonment. R. 95; App. 24a-28a. All of the above actions are unreported.

On May 18, 2008, Olofson filed a timely notice of appeal. R. 99. On May 1, 2009 (after oral argument on January 22, 2009), the court of appeals entered its judgment affirming Olofson's conviction. App. 1a-21a. The decision is reported at 563 F.3d 652 (7th Cir. 2009).

JURISDICTION

The decision of the court of appeals was entered on May 1, 2009. On May 14, 2009, Olofson filed a timely

Petition for Rehearing *En Banc*, which was denied on June 1, 2009. App. 22a-23a. This Court has jurisdiction under 28 U.S.C. section 1254(1), this petition having been timely filed under Rule 13 of the Rules of the U.S. Supreme Court.

STATUTORY PROVISIONS INVOLVED

This case involves 18 U.S.C. section 922(o), which reads, in pertinent part, "it shall be unlawful for any person to transfer ... a machinegun," and 18 U.S.C. section 924(a)(2), which reads, in pertinent part, "[w]hoever knowingly violates subsection ... (o) of section 922 shall be ... imprisoned not more than 10 years ...." App. 29a. This case also involves 18 U.S.C. section 921(a)(23), which reads "[t]he term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act," which, in turn and in pertinent part, reads that "[t]he term 'machinegun' means any weapon which shoots ... automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b); App. 30a.

STATEMENT OF THE CASE

This petition concerns the meaning of "automatically," as applied to a malfunctioning semiautomatic rifle, in a prosecution for the knowing transfer of a machinegun (as defined in 26 U.S.C. section 5845(b)) in alleged violation of 18 U.S.C. sections 922(o) and 924(a)(2).

On December 5, 2006, a grand jury returned a one-count indictment charging Olofson of having, on July 13, 2006, knowingly transferred a machinegun — an Olympic Arms, .223 caliber SGW rifle, model CAR-AR ("hereinafter AR-15") — in violation of 18 U.S.C. sections 922(o) and 924(a)(2). App. 29a. On January 8, 2008, after a plea of not guilty and a two-day trial, a jury found Olofson guilty as charged. App. 24a-26a. On May 13, 2008, the district court imposed judgment, sentencing Olofson to 30 months' imprisonment. App. 27a-28a.

A. Olofson's AR-15: A Malfunctioning Semiautomatic Rifle.

Olofson was a member of the U.S. Army Reserves. Tr. 85, ll. 18-19. On July 13, 2006, Olofson loaned to Robert Kiernicki ("Kiernicki"), without charge, Olofson's AR-15 semiautomatic rifle and a supply of ammunition for use at a nearby shooting range. Tr. 37, l. 8 – 38, l. 13.

Already familiar with the function of the safety of the AR-15 when placed in the "safety" and "fire" positions (Tr. 35, ll. 21-22; 36, ll. 9-22), Kiernicki asked Olofson what would happen if the selector switch were moved to what he called an "unmarked" position. Tr. 46, ll. 11-15. Olofson told Kiernicki not to put the AR-15 in such an unmarked position, because it would "malfunction." Tr. 46, ll. 7-21.

Nonetheless, at the shooting range, Kiernicki "at least twice" moved the safety into the unmarked position, pulled the trigger and — without releasing

the trigger or exhausting the ammunition in the magazine — the AR-15 fired three shots and then jammed. Tr. 46, l. 16 – 47, l. 8.

In response to a telephone complaint concerning "automatic fire," the local police arrived, identified Kiernicki as "the one doing that," and took down the serial numbers of three guns, including Olofson's AR-15. Tr. 40, ll. 3-22. Later the same day, the local police came to Kiernicki's home and confiscated Olofson's rifle. Tr. 41, ll. 8-10. On July 16, 2006, the federal Bureau of Alcohol, Tobacco and Firearms ("ATF") executed a search warrant at Olofson's home. Tr. 62, ll. 4-9. After an extensive search, the ATF agents found neither automatic weapons nor automatic weapon parts. Tr. 68, ll. 17-21. During the search, ATF special agent Jody Keeku ("Keeku") "told Olofson that [his AR-15] had fired automatically," to which Olofson replied "if that happened then it was a malfunction." Tr. 68, ll. 1-16.

B. The First ATF Firearm Test: Olofson's AR-15 Determined Not to Be a Machinegun.

On October 11, 2006, an ATF firearms enforcement officer, Max Kingery (hereinafter "Kingery"), conducted an inspection of Olofson's AR-15. Tr. 100, ll. 23-25 – 101, ll. 1-13; Tr. 122, ll. 8-10. Kingery found that Olofson's AR-15 had been assembled with four M-16 parts — "the trigger, the hammer, the disconnector, and the selector switch" Tr. 102, ll. 1-6. Kingery acknowledged that an instruction manual entitled, "AR-15 to M-16 Conversion" – Government Exhibit 9 — stated that a semiautomatic firearm like Olofson's

AR-15 required a fifth M-16 part to function as a machinegun. Tr. 102, l. 20 – 103, l. 19. Nevertheless, Kingery — in **reliance** on his "training and experience," and **before** conducting any test of the firearm itself — concluded that the "effect of having those four components" would be to make Olofson's AR-15 "fire automatically." Tr. 103, l. 22 – 104, l. 11.

Upon testing the rifle, however, it did not fire more than one round. *See* Tr. 107, ll. 4-7. Instead, after testing the AR-15 in the "safety" and "fire" positions — each of which tested as Kingery expected (Tr. 105, ll. 2-24) — Kingery placed the safety into the unmarked position and, after "squeez[ing] the trigger[,] the weapon fired one round, ejected that round, loaded another, and then the hammer followed that round forward but failed to fire, [being] caught in the semiauto position [and] not allowed to continue forward." Tr. 106, ll. 6-8, 17-18. As Kingery acknowledged, Olofson's AR-15 experienced "a malfunction they call hammer follow or follow through" Tr. 122, ll. 19-25 – 123, ll. 1-2. Thus, on the basis of the October 2006 test, Kingery concluded that Olofson's malfunctioning AR-15 was **not a machine gun**. Tr. 124, ll. 21-25 – 125, l. 1.

Kingery's initial opinion thus was consistent with that of Olofson's firearms expert witness Savage, who concluded that "in the unmarked position" the firearm exhibits a malfunction called a "hammer follow" (Tr. 167, ll. 8-9 and 170, ll. 1-24), and "you're not supposed to put it" in that position. Tr. 167, ll. 7-11.

C. A Second and Third ATF Firearms "Test": Olofson's AR-15 Said to Be a Machine gun.

One month later, in November 2006, Keeku requested that Kingery conduct a second test. Tr. 125, ll. 14-17. This time, Kingery, after checking the AR-15 in the "safety" position, skipped the "semiauto position" and went directly to the unmarked position "and squeezed the trigger." Tr. 108, ll. 18-21. Then, with the AR-15 in that position, Kingery testified that he "held the trigger down and it emptied all 20 rounds [in the magazine] without any stoppage." Tr. 109, ll. 8-19. Further, Kingery averred that he tested the weapon by pulling and releasing the trigger, causing the weapon to "fire[] in five to 10 round bursts by [himself] functioning the trigger in five to 10 round bursts." Tr. 109, ll. 20-25.

When asked why the AR-15 fired differently in the two tests, Kingery explained that it was "due to the ammunition [he] was using":

> Even though it was commercially available ammunition [in the first test], it was a military grade ammunition which has much harder primer than standard civilian ammunition. [Tr. 107, ll. 16-19.]

According to Kingery, the "harder primer" ammunition was designed to ensure that a firearm's "firing pin" would not "strik[e] the primer," and "accidentally" cause the firearm to "go off." Tr. 108, ll. 1-9. However, when pressed on cross-examination whether the utilization of a "softer primer" ammunition grade

would increase the likelihood of "multiple firings," Kingery denied that the "softer" civilian grade of ammunition would have had any such effect. Tr. 126, l. 12 – 127, l. 19.

When pressed further on cross, Kingery was asked why during the second test he had failed to test the AR-15 in the semiautomatic position. Tr. 127, ll. 20-25. Kingery replied, "because I already knew that it would function." Tr. 128, ll. 1-2. Yet, Kingery admitted that, by utilizing a different ammunition, it was "possible" that, even in the semi-automatic position, Olofson's AR-15 could have malfunctioned, either by "hammer follow" or by misfiring more than one shot at the single pull of a trigger. Tr. 128, l. 3 – 129, l. 3.

After Olofson was indicted, a third videotaped test was ordered without requiring the presence of Olofson or his counsel, the videotape to be made available to Olofson afterwards for his examination. R. 29 (Court minutes dated February 13, 2007). Like the second "test," the third "test" was limited to firing the AR-15 in the unmarked position only, using the same kind of soft-primered ammunition. Consequently, the results were said to be the same. *See* Tr. 110, l. 16 – 112, l. 6.

D. Prosecution's Definition of "Machine gun" as a Weapon that — No Matter What the Cause — Shoots More than One Shot at the Single Pull of the Trigger.

At the pretrial conference, Olofson postulated that, like the AR-15 at issue in Staples v. United States,[1] his AR-15 shot more than one shot only as a result of a "malfunction." Pretrial Transcript ("Pretr. Tr.") at 25, l. 11 – 26, l. 2; App. 34a-35a. Thus, Olofson sought a jury instruction incorporating the "definition of fully automatic ... from footnote 1" in Staples. Pretr. Tr. 34, ll. 15-19; App. 36a-37a. In response, the prosecution advanced an argument, one that it consistently made throughout the trial, that: "[A] machine gun is any weapon that shoots more than one shot without manual reloading by a single function of the trigger." Pretr. Tr. 35, ll. 7-8; App. 37a. As the prosecution explained later in the trial, whether Olofson's AR-15 shot more than one shot at the single pull of the trigger as a result of a "hammer follow" malfunction "makes [no] difference under the statute [:] If you pull the trigger [of a firearm] once and it fires more than one round, **no matter what the cause**, it's a machine gun." Tr. 151, ll. 9-15 (emphasis added).

Thus, in his opening statement, the prosecution stated that "if a firearm expels more than one round with a single pull of the trigger, that firearm is a machine gun." Tr. 12, ll. 7-9. Three times during the course of government expert Kingery's testimony, the

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[1] 511 U.S. 600 (1994).

prosecutor elicited the same unqualified answer — that, in Kingery's expert opinion, Olofson's AR-15 was a machinegun because it could fire or did fire more than one shot at the single pull of the trigger without manual reloading. Tr. 102, ll. 7-19; Tr. 110, ll. 1-8; Tr. 112, ll. 8-18.

In closing argument, the prosecution continued in the same vein, contending before the jury that, "if you have a gun, you pull the trigger once and more than one shot is fired, that firearm is a machine gun." Tr. 189, ll. 1-2.

Thus, the prosecution insisted that, whether the jury considered the testimony of Kiernicki that Olofson's AR-15 fired three shots and then jammed, or that of Kingery with respect to the second and third tests of that AR-15, the jury should find that Olofson's AR-15 was a machine gun because "when you pull the trigger once on that firearm more than one round is fired." Tr. 190, ll. 21-25 – 191, ll. 1-4.

E. The Trial Court's Jury Instructions Omitted Any Guidance as to the Meaning of "Automatically" as Applied to Olofson's AR-15.

At the final pretrial conference, Olofson requested the trial court include the definition of "automatically" set forth in Staples v. United States 511 U.S. 600, 602 n.1 (1994). *See* Pretr. Tr. 34, ll. 15-19.

Refusing Olofson's request, the trial court omitted the Staples definition, instructing the jury in the

language of the statute that "[a] machine gun is any weapon that shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single pull of the trigger." Tr. 219, l. 25 – 220, l. 3, App. 33a. Accordingly, the trial court instructed the jury that it must find only "that the defendant knew, or was aware of, the essential characteristics of the firearm that made it a machine gun," without spelling out to the jury what those essential characteristics were. Tr. 220, ll. 5-9, App. 33a.

F. In its Review of Olofson's Motion for Acquittal, the District Court Applied the Prosecution's Definition of "Automatically."

On May 13, 2009, at Olofson's sentencing hearing, the district court denied Olofson's motion for acquittal on the grounds of insufficiency of the evidence. *See* Sent. Tr. 21, ll. 10-14. In its assessment of the testimony of Kiernicki, the court commented:

> Olofson had informed [Kiernicki] that he knew that it was an automatic function. Olofson mentioned to [Kiernicki] that he had fired the weapon in the three-round burst position and the weapon had jammed on him. There Olofson is stating that he not only operated this rifle in the automatic mode, but he had done so prior to turning it over to [Kiernicki] for firing. [Sent. Tr., 15, ll. 10-16.]

Thus, in reliance on this view of "automatic," the court concluded "that Mr. Olofson knew the weapon at issue here could fire automatically." *See* Sent. Tr., 20, ll. 19-22.

G. The Court of Appeals Rejected the Staples Definition of "Automatic."

Even though Olofson's request for a jury instruction on the meaning of "automatic" tracked *verbatim* the definition of that term in Staples — "that once the trigger is depressed the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted" — the court of appeals ruled that the trial court "properly rejected it" because "Olofson's proffered instruction was **not** an accurate statement of the law." United States v. Olofson, 563 F.3d at 659, App. 11a (emphasis added).

Instead, the court of appeals determined that the true meaning of the statutory term was fixed by the definition of "automatically" as that term "was commonly used and understood in 1934, the year in which the definition of 'machine gun' became law." *Id.* at 658, App. 9a-10a. Stating that such 1934 meaning "comports with its ordinary modern meaning ... that is readily accessible to laypersons and is in no sense confusing," the court of appeals concluded that "the district court was not required to define that term for the jury." *Id* at 659, App. 11a.

Further, the court of appeals dismissed Olofson's contention that the trial court had applied an erroneous standard of "automatically" to Olofson's

motion for acquittal on the grounds of the insufficiency of the evidence. *Id.* at 659, App. 11a-12a. As was the case with the trial court, the court of appeals relied solely upon the evidence of what Olofson knew about his AR-15 before Kiernicki borrowed it — that "the three-round burst wouldn't work and that it would jam up":

> That testimony was sufficient for a reasonable jury to find beyond a reasonable doubt that the defendant knew that the AR-15, with a single pull of the trigger and without manual reloading, could shoot more than one round as the result of a self-acting mechanism. [*Id.* at 659, App. 12a.]

REASONS FOR GRANTING THE WRIT

Petitioner, a U.S. Army Reservist, is now serving a 30-month prison sentence for a felony conviction for the knowing transfer of a machinegun, despite the absence of any evidence that he knew that his malfunctioning, semi-automatic rifle would "shoot ... automatically," under 26 U.S.C. section 5845(b), as defined and applied in Staples v. United States, 511 U.S. 600 (1994).

Not only did the courts below disregard Staples in their review of the sufficiency of the evidence, but they rejected Petitioner's requested jury instruction on the meaning of "automatically," even though it was a **verbatim** recital of the Staples definition. Indeed, the court of appeals "went rogue" in further ruling the Staples definition was "an inaccurate statement of the

law." The court of appeals affirmance of Petitioner's conviction is not only in irreconcilable conflict with Staples, and the application of the Staples mens rea rule by the First and Eighth Circuits, but also incompatible with relevant legislative history, prior ATF rulings and practices, and usage in the firearms industry.

Only by reaffirming the definition of "automatically" in Staples will law-abiding owners of semiautomatic rifles and handguns be protected from prosecutions that would make them "felons-by-chance," in derogation of their right to keep and bear arms.

I. The Court of Appeals' Affirmance of Olofson's Conviction Creates an Irreconcilable Conflict with Staples v. United States and with the U.S. Courts of Appeals for the First and Eighth Circuits.

Both the court of appeals and the district court failed to comply with this Court's decision in Staples v. United States, 511 U.S. 600 (1994). The Staples Court determined that Congress did not intend to create a strict liability crime of unlawful possession of a machinegun, but required the government to prove that the defendant knew that his semiautomatic rifle would actually shoot "fully automatically," as defined in footnote 1 of its opinion: "That ...once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." *Id.*, 511 U.S. at 602 n.1. There is no

evidence that Olofson had any such knowledge at the time of the alleged illegal transfer.

There are important similarities between the instant case and Staples. Both cases involved an AR-15 rifle manufactured by Olympic Arms, Inc. of Olympia, Washington.[2] (An AR-15 is the civilian variant of the military's fully automatic M-16 rifle, but specifically designed to fire only in a semiautomatic mode.)[3] Both the Staples and Olofson rifles contained certain M-16 parts[4], and, indeed, many such AR-15's were manufactured with certain M-16 parts.[5] Importantly, neither rifle contained an M-16 "auto-sear," which is considered to be the critical part which could transform an AR-15 rifle into a machinegun, nor an M-16 bolt carrier.[6] In both cases the government argued that the rifle was a machinegun, not because it was designed or modified to shoot automatically, but only that arguably it could so shoot.[7] And, in both cases the defendant contended that, if the AR-15 fired more than one shot at the single pull of a trigger, it

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[2] *See* Staples, 511 U.S. at 603 and App. 32a.

[3] *See* Staples, 511 U.S. at 603.

[4] *See* Staples, 511 U.S. at 603 and page 4, *supra*.

[5] *See* Staples, Brief of Petitioner *8, 1992 U.S. Briefs 1441 (1993).

[6] *See* Staples, Brief of Petitioner *8 and Tr. 119, ll. 1-3 and 121, ll. 4-6.

[7] *See* Staples, Brief for the United States, 1992 U.S. Briefs 1441 at *10-11 and pages 7-9, *supra*.

would be the result of a malfunction, and that a malfunctioning semiautomatic rifle is not a machinegun.[8] Indeed, the first test of the Olofson rifle by the government determined that Olofson's rifle was a malfunctioning semiautomatic rifle, not a machinegun.[9]

In Staples, the defendant had "requested the district court to instruct the jury that, to establish a violation ..., the Government must prove beyond a reasonable doubt that the defendant 'knew that the gun would fire **fully automatically**.'"[10] The Staples Court found the denial of defendant's request to be reversible error, and "remanded [the case] for further proceedings consistent with [its] opinion."[11]

As in Staples, there was no evidence at trial that Olofson knew — at the time that the alleged criminal act took place — that the weapon fired "fully automatically" under the Staples definition.[12] Indeed, the only record evidence as to Olofson's knowledge was that he knew his rifle could malfunction and sometimes fire more than one round and then jam, without the release of the trigger or the exhaustion of the ammunition, the ATF tests of Olofson's AR-15

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[8] *See* Staples, Brief of Petitioner *12 and pages 7-8, *supra*.

[9] *See* pages 4-5, *supra*.

[10] Staples, 511 U.S. at 603-04 (emphasis added).

[11] Staples, 511 U.S. at 620.

[12] *See* Staples, 511 U.S. at 602 n.1.

having been conducted months after the July 2006 transfer.[13] Yet, the district court refused to apply the Staples definition in its review of the sufficiency of the evidence, and refused to include that definition in its jury instructions.

A. The Rulings of the Courts Below on the Sufficiency of the Evidence Conflict with Staples and the Opinions of Two Other Federal Circuits.

1. The Courts Below Refused to Apply the Staples Definition.

According to Staples, the government would have had to prove beyond a reasonable doubt that Olofson knew at the time of the transfer of his AR-15 semiautomatic that the firearm could shoot automatically, that is, "once its trigger is depressed, the weapon will automatically continue to fire until the trigger is released or the ammunition is exhausted." *Id.* At the time that Kiernicki borrowed Olofson's AR-15, the evidence — construed most favorably for the prosecution — showed only that Olofson knew that the AR-15 could malfunction, firing three or four shots at the single pull of the trigger without manual reloading and then jam.

According to the prosecution's expansive view of "automatically," however, a malfunctioning rifle which jammed after shooting more than one shot at the

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[13] *See* pages 3-7, *supra*.

single pull of the trigger is a machinegun, regardless of whether it stopped shooting before either the trigger was released or the ammunition was exhausted. Embracing the prosecution's promiscuous definition of "automatically" — that at the single pull of the trigger a firearm shoots more than one shot, "no matter what the cause"[14] — the trial court improperly ruled that the evidence was sufficient to establish that Olofson knew that his malfunctioning semiautomatic was a machinegun. *See* Sent. Tr. 15, ll. 10-16.

Although the court of appeals affirmed, it did so only after rejecting Staples and applying its own definition of "automatically," thereby enabling it to find that evidence showing that Olofson knew, at the time of the transfer, that the AR-15 had previously fired more than one shot and jammed "was sufficient for a reasonable jury to find beyond a reasonable doubt that the defendant knew that the AR-15, with a single pull of the trigger and without manual reloading, could shoot more than one round **as the result of a self-acting mechanism.**" Olofson, 563 F.3d at 659; App. 12a (emphasis added). Had either court below applied the Staples definition, it could not have justified its finding.

2. The Staples Definition of "Automatic" Was Material to its Mens Rea Holding.

According to the court of appeals, the Staples definition did not apply to the Olofson transfer because

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[14] Tr. 151, ll. 9-15.

"[t]he precise definition of 'automatically' was not at issue [in Staples]; therefore the Court's discussion of the terms 'automatic' and 'fully automatic' was immaterial to its holding." Olofson, 563 F.3d at 657; App. 7a-8a. The court of appeals was mistaken.

The mens rea rule laid down in Staples is "that to be criminally liable a defendant must know that his weapon possessed **automatic firing capability so as to make it a machinegun as defined by the National Firearms Act.**" United States v. X-Citement Video, Inc., 513 U.S. 64, 71 (1994) (emphasis added). In X-Citement Video, this Court explained that Staples held that such specific knowledge of "the features of a gun as **technically** described by the firearm registration Act" was necessary in order that "otherwise innocent conduct" would **not** be "criminalized." *Id.*, 513 U.S. at 72 (emphasis added).

In an effort to give further direction to the application of the Staples holding — that "the mens rea element ... requires the Government to prove the defendant knew that **the item** he possessed had the **characteristics** that brought it within the statutory definition of a firearm"[15] — this Court, in an opinion written by two justices in the Staples majority and two in dissent, said:

> [P]etitioner was charged with the unlawful possession of a machine-gun in violation of 18 U.S.C. §922(o). His conviction on that count was

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[15] Rogers v. United States, 522 U.S. 252, 254 (1998) (emphasis added).

> reversed on appeal after the Government conceded that the evidence did **not** establish that petitioner **knew** that the **gun** had been **modified** to act as a **fully automatic** weapon.... **Reversal was therefore required under Staples**.... [Rogers v. United States, 522 U.S. 252, 254 n.1 (1998) (emphasis added).]

3. The Ruling of the Court of Appeals Conflicts with Decisions of the U.S. Courts of Appeals for the First and Eighth Circuits.

In United States v. Nieves-Castano, 480 F.3d 597 (1st Cir. 2007), the First Circuit implemented the mens rea rule in Staples by applying the definitional distinction between a machinegun and a semiautomatic firearm as set forth in footnote 1 of Staples. *Id.*, 480 F.3d at 600. The court concluded that, even though there was sufficient evidence to establish that the AK-47 semiautomatic weapon at issue was "**capable** of **fully automatic** fire," the evidence was **insufficient** to establish beyond a reasonable doubt that the defendant knew "that the rifle possessed the characteristics of an **automatic** weapon." *Id.*, 480 F.3d at 600 (emphasis added).

Similarly, in United States v. Backer, 362 F.3d 504 (8th Cir. 2004), the Eighth Circuit used the Staples terminology of "fully-automatic" in its effort to apply the Staples "mens rea standard" to the sufficiency of the evidence in its review of whether a defendant knew that his originally-designed semiautomatic firearm "operated as a machine gun." *Id.*, 362 F.3d at 507. In

its analysis of the evidence, the Backer court referred to pages 603 through 606 of the Staples opinion[16] where: (a) the term, "semiautomatic," appears in juxtaposition to "automatic" and "fully automatic," reflecting the distinction between the meaning of the terms, as set forth in Staples footnote 1, and (b) the mens rea issue is framed in relation to the "automatic" and "fully automatic" firing capability of the weapon at issue. *See* Staples, 511 U.S. at 603-05. Additionally, the Backer court cited to pages 614-15 of the Staples decision[17] where the Supreme Court wrapped up its discussion of its mens rea rule, reiterating the rule's distinction between a "semiautomatic" and "fully automatic" weapon, and the importance of ensuring that no one "who has purchased what he believes to be a semiautomatic rifle or handgun ... can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic." *See* Staples, 511 U.S. at 615.

In sum, the courts of appeals for both the First and Eighth Circuits found that the definition of "automatic" or "fully automatic" was material to the Staples mens rea holding, and decided accordingly.

4. The Ruling of the Court of Appeals Conflicts with Staples.

Unlike the First and Eighth Circuits, the court of appeals below dismissed Staples footnote 1 as no more

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[16] Backer, 362 F.3d at 507.

[17] Backer, 362 F.3d at 507.

than "a glossary for terms frequently appearing in the opinion," and thus ruled that the definitions of "'automatic' and 'fully automatic'" were not to be understood as terms of statutory interpretation. Olofson, 563 F.3d at 657; App. 8a. To the contrary, however, the Staples Court expressly adopted the term "fully automatic" to identify those firearms that are "within the meaning of" 26 U.S.C. section 5845(b) as it applies to "'any weapon which **shoots** ... automatically more than one shot, without manual reloading, by a single function of the trigger." *Id.*, 511 U.S. at 602 (emphasis added). Indeed, after setting forth its definition of "automatic" or "fully automatic" in the footnote, the Staples Court stated that "[s]uch weapons are 'machineguns' within the meaning of the Act." Staples, 511 U.S. at 602 n.1.

The court of appeals insisted, however, that the "preface[]" to footnote 1 — "as used here" — limited the footnote's application to the opinion. Olofson, 563 F.3d at 657, App. 8a. But the footnote applied to "the Act," not to "the opinion." *See* Staples, 511 U.S. at 602. Further, the word, "here," means "at this point in space," or "in this location," not "in what follows." Webster's Third New International Dictionary 1058 (1964). Had the Court meant its definitions in footnote 1 as a guide to the reader of its opinion, and not as an interpretation of the Act itself, the Court would have used the prefatory phrase, "as used hereinafter," *i.e.*, "in the following part of this opinion." *See id.* at 1059.

B. Staples Requires a Jury Instruction Specifying the Meaning of "Automatically" in a Prosecution under 18 U.S.C. Section 922(o).

Because the court of appeals below dismissed Staples footnote 1 as a "glossary [of] terms," rather than an authoritatively binding interpretation of the meaning of "automatically," it concluded that Staples "did not establish a requirement for district courts to instruct juries on the meaning of 'automatically' from § 5845(b)." Olofson, 563 F.3d at 657; App. 8a. The court was not only mistaken; its conclusion put it in direct conflict with Staples.

In Rogers v. United States, 522 U.S. 252 (1998), a Court plurality expressed its understanding that, under Staples, prosecution for possession of any section 5845(b) "firearm" — including a silencer — would "require[] the Government to prove that the defendant knew that the item he possessed had the characteristics that brought it within the statutory definition of a firearm." *Id.*, 522 U.S. at 254. Although the Court found the particular mens rea instruction in Rogers to have been sufficient to apprise the jury that the government must prove beyond a reasonable doubt that the defendant knew the silencer to be a silencer, the Rogers plurality noted its assumption "that the trial judge would have been **more explicit in explaining the mens rea element of these offenses if Staples had been decided prior to submitting the case to the jury**." *Id.*, 522 U.S. at 258 (emphasis added). Furthermore, the plurality observed that "[i]t would be wise for trial courts to

explain the Staples requirement more carefully than the instruction used in this case to foreclose any possibility that jurors might [mistakenly] interpret the instruction" not to require that the defendant knew "that he possessed a device having **all the characteristics** of a silencer." *Id.*, 522 U.S. at 258 n.7 (emphasis added). *See also id.*, 522 U.S. at 259 (O'Connor, J., concurring).

Without doubt, then, this Court expected that the mens rea requirement in Staples would have a direct impact upon the requisite jury instructions, mandating that the instructions be sufficiently **explicit** so as to ensure that the defendant knew that the weapon at issue had **every** characteristic of a forbidden firearm, lest the defendant be subject to a substantial fine and prison sentence for engaging in "otherwise innocent activity." *See* United States v. X-Citement Video, Inc., 513 U.S. at 72. Accordingly, the "scienter requirement" laid down in Staples was expected to "apply to each of the statutory elements," one of which was "the **features** of a gun as **technically** described by the firearm registration Act...." *Id.* (emphasis added).

One of the features of the definition in 26 U.S.C. section 5845(b) is that a weapon "shoot[] ... automatically." Thus, Olofson requested the trial court to instruct the jury that it must find that, at the time of the transfer of his AR-15, Olofson knew that his AR-15 would "shoot[] ... automatically," that is, "once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition exhausted." Staples, 511

U.S. at 602 n.1. But the trial court refused, instructing the jury merely that the evidence must show beyond a reasonable doubt that Olofson "knew of the **features** of the gun that made it a machine gun as defined by federal law when he transferred the gun." (App. 33a (emphasis added)) or "that the defendant knew, or was aware of, the **essential characteristics** of the firearm which made it a machine gun." App. 33a (emphasis added).

By failing to articulate the specific "features" or "characteristics" of a weapon that "shoots ... automatically" are, neither instruction served as an adequate guide to the jury, especially in light of the prosecution's persistently mistaken advocacy before the jury that Olofson's AR-15 was a machinegun because it shot more than one shot at the single pull of a trigger, even though it stopped shooting because it jammed.[18] *See* United States v. Smith, 217 F.3d 746, 751 (9th Cir. 2000) (conviction for violation of 18 U.S.C. section 922(o) reversed for failure to give specific instruction on knowledge necessitated by the government's misstatements of law to the jury).

According to the court of appeals below, however, "the *Staples* footnote ... merely 'offer[ed] commonsense explanations' of the words 'automatic' and 'semiautomatic.'" Olofson, 562 F.3d at 658; App. 9a. Yet, it rejected those "explanations" as inaccurate statements of the law in favor of a different meaning of "automatically" and inexplicably concluded that its

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[18] *E.g.*, Tr. 204, ll. 8-18.

definition was "readily accessible to lay persons and ... in no sense confusing." *Id.* at 659; App. 11a.

Staples, however, mandates that the jury be specifically instructed on those "features ... technically described" by 26 U.S.C. section 5845(b) as an element of the offense. *See* X-Citement Video, 513 U.S. at 72.

While the Staples footnote 1 definition of "automatically" does not cite to any source, the definition conforms to the technical meaning of "automatically," as applied to weapons,[19] not to its general, ordinary meaning. Further, the Staples record in the trial court featured a battle of the experts over whether the AR-15 firearm in that case could be fired in a "fully automatic mode" or whether its "automatic firing capability ... was the result of a malfunction." *See* Staples, Brief of the United States at *8-*12. Similarly, the trial of Olofson uncovered differing technical opinions as to whether Olofson's malfunctioning semiautomatic rifle shoot automatically as a machinegun. *Compare, e.g.*, Tr. 101, l. 14 – 102, l. 19 *with* Tr. 166, l. 19 – 168, l. 11. The court of appeals, however, ruled that "the district court correctly used § 5845(b) to instruct the jury" (Olofson, 563 F.3d at 659; App. 11a), erroneously presuming that the bare language of section 5845(b) would offer sufficient guidance to the jury.

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[19] *See* pages 35-36, *infra*.

C. The Court of Appeals Presumptuously and Incorrectly Denounced the Staples Definition of "Automatic" as "Not an Accurate Statement of the Law."

After liberating itself from the Staples footnote — as immaterial to the holding of the case, and irrelevant to any jury instruction on "automatically" — the court of appeals went one step further, denouncing the Staples definition of "automatically" as "not an accurate statement of law." Olofson, 562 F.3d at 659; App. 11a.

In order to reach such a conclusion, the three-judge panel was first compelled to address whether the Seventh Circuit opinion in United States v. Fleischli, 305 F.3d 643 (7th Cir. 2002), had foreclosed this option, since Fleischli had applied *verbatim* the Staples footnote definition of "automatic" in a ruling that a triggerless minigun was a machine gun. *Id.*, 305 F.3d at 654-55.

According to the panel below, Fleischli had just "borrow[ed] terminology from *Staples* in order to stamp out the appellant's 'disingenuous argument'" that his minigun was a semiautomatic firearm. Olofson, 563 F.3d at 658; App. 8a. Relying on Fleischli's characterization of the Staples footnote as having "offered common sense explanations of the terms 'automatic' and 'semiautomatic,'" the panel below concluded that Fleischli had not "consider[ed] [Staples] to be precedentially binding." Olofson, 562 F.3d at 658; App. 9a. In short, the panel concluded

that Fleischli was not binding because the Staples footnote was not binding.

Once free from having to conform to Staples and Fleischli as a matter of precedent, the Olofson panel was still encumbered with the duty to define "automatically." Relying on the general rule that "'the most relevant time for determining a statutory term's meaning' is the year of the provision's enactment," the panel chose a dictionary definition of "automatic" that "was commonly used and understood in 1934, the year in which the definition of 'machinegun' became law with the passage of the National Firearms Act." Olofson, 362 F.3d at 658; App. 9a-10a. But it offered no explanation why it chose the "common" meaning of "automatically"[20] when the very same 1934 dictionary contained a definition of "automatic gun"[21] that conformed to the Staples definition.[22] Yet, without any discussion of the merits of the Staples definition, the panel summarily concluded that "[i]n light of [its] interpretation ... Olofson's proffered instruction was

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[20] "Having a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation."

[21] "A firearm which, after the first round is exploded, by gas pressure or force of recoil automatically extracts and ejects the empty case, loads another round into the chamber, fires, and repeats the above cycle, **until the ammunition in the feeding mechanism is exhausted or the trigger is released.**" (Emphasis added.)

[22] This oversight is discussed more specifically at pages 31-32, *infra*.

not an accurate statement of the law." Olofson, 362 F.3d at 659; App. 11a.

Because Olofson had requested an instruction incorporating *verbatim* the meaning of automatic in Staples footnote 1, and that instruction was found to be incompatible with the panel's definition of "automatically," then the panel opinion, in effect, purports to overrule the Staples definition of "automatic." And, insofar as Fleischli rests upon the Staples definition, the panel effectively overruled Fleischli.

On May 15, 2009, Olofson filed a timely Petition for Rehearing *En Banc*, calling the full court's attention to the panel's conflict within the Seventh Circuit — and more importantly the conflict between the panel decision and Staples. Nevertheless, on June 1, 2009, Olofson's rehearing petition was denied without a single judge in active service requesting a vote, even though Olofson called the full court's attention to "the rule that Supreme Court precedents are binding on lower federal courts." *See* Olofson Petition For Rehearing, p. 15.

As demonstrated above, the Staples footnote-one definition of "automatic" or "fully automatic" has direct application to this case. Indeed, even the facts in Staples are remarkably similar. Both cases involved an AR-15 semiautomatic rifle that could shoot more than one shot at the single pull of the trigger. And both cases posed the same question: Whether the multiple shots were the consequence of a malfunction, and, if not, whether the defendant knew or was aware

of the automatic firing capability of the AR-15. To resolve these issues, the Staples court employed its footnote-one definitions distinguishing between a machinegun and a semiautomatic rifle. At trial and on appeal, Olofson attempted to employ those same definitions, only to be rebuffed by the trial court, and then to be told by the court of appeals, effectively, that the Supreme Court did not know what it was talking about when it laid down the definition of "automatically" in Staples.

Appellate courts have been instructed to follow the Supreme Court, leaving to that Court "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). This is that rare case where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." *See* Rule 10(a), Rules of the U.S. Supreme Court.

II. The Court of Appeals' Affirmance Based on an Erroneous Definition of "Automatic" Presents an Important Question of Federal Law that Should Be Settled by this Court.

A. The Trial Court Adopted the Prosecution's Erroneous Understanding of What Constitutes "Automatic" Fire.

In support of his request for the Staples jury instruction, Olofson argued that a malfunctioning semiautomatic rifle that could exhibit some multiple round fire and then jam "did not fire until the trigger

was released or until it emptied the magazine," and therefore would not be a machinegun. *See* Pretr. Tr. 26, l. 24 – 27, l. 1; 34, ll. 15-19; App. 35a-37a.

The prosecutor asserted that the Staples definition "seems to be inconsistent with the statutory definition which provides that a machine gun is any weapon that shoots more than one shot without manual reloading by a single function of the trigger." *Id.*, 35, ll. 5-10. Conspicuously absent from the prosecutor's understanding of the "statutory definition" of a machinegun was the word "automatically." *See* 26 U.S.C. § 5845(b). That the omission was not inadvertent became clear later in the trial when the prosecutor objected as follows to Olofson's proffer that his expert witness would testify that Olofson's AR-15 fired more than one shot because of a **malfunction**, namely, a "hammer follow condition"[23]:

> **[T]here's no indication that it makes any difference** under the statute. If you pull the trigger once and it fires more than one round, **no matter what the cause**, it's a machine gun. [Tr. 151, ll. 9-15 (emphasis added).]

In response, Olofson contended that "[t]he Staples case, footnote one" would be necessary, to guide the jury to properly consider the defense's "issue about the hammer follow and what happened with the three rounds and then stopping." Tr. 151, ll. 16-22. Although the trial court allowed Olofson's expert

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[23] Tr. 150, l. 22 – 151, l. 1.

witness to testify about the malfunction (Tr. 166, l. 19 – 167, l. 14), it denied Olofson's corresponding jury instruction request.

The court of appeals affirmed, ruling that "the district court was not required to define [automatically] for the jury," its "meaning [being] readily accessible to laypersons." Olofson, 562 F.3d at 659; App. 11a. As the court of appeals assumed:

> Under [its] interpretation ... a defendant can still argue that the *reason a gun fired more than one round* (with a single pull of the trigger without manual reloading) was due to a malfunction — i.e., the additional rounds fired resulted from a mishap rather than from a **regular self-acting mechanism**. [*Id.* at 658-59; App. 11a (italics original) (bold added).]

The court of appeals failed to recognize that, without express guidance, a jury would not know that a malfunction would negate a finding of "automatically." But the court of appeals' own definition of automatically did not distinguish between an irregular "self-acting mechanism" and a "regular" one and, thus, fell far short of the Staples definition.

B. The Court of Appeals' 1934 Definition of "Automatically" Is Demonstrably Erroneous.

The court of appeals placed its reliance on a definition drawn from a 1934 dictionary, to learn how "automatically" "was commonly used and understood

in 1934, the year in which the definition of 'machinegun' became law with the passage of the National Firearms Act." 563 F.3d at 658; App. 9a-10a. Thus, relying on that dictionary, the court concluded that "**automatic**" meant "[h]aving a self-acting or self-regulating mechanism which performs a required act at a predetermined point in an operation." *Id.*

However, on the same page of the same dictionary appears a definition of "automatic gun" similar to that in Staples, but which was ignored by the court:

> A firearm which, after the first round is exploded, by gas pressure or force of recoil automatically extracts and ejects the empty case, loads another round into the chamber, fires, and repeats the above cycle, **until the ammunition** in the feeding mechanism is **exhausted or pressure on the trigger is released**. [Webster's New International Dictionary 187 (2d ed 1934) (emphasis added).]

The court of appeals offered no explanation why it chose "the ordinary meaning" of "automatic" over this more contextual one. Nor did the court explore the legislative history of the Federal Firearms Act of 1934 for clues as to the meaning of this critical term.

As initially enacted in the Federal Firearms Act of 1934, a "machinegun" was defined as follows:

> The term "machine gun" means any weapon which shoots, or is designed to shoot, **automatically or semiautomatically**, more

> than one shot, without manual reloading, by a single function of the trigger. [48 Stat. 1236 (73d Cong., 2d Sess., June 26, 1934) (emphasis added).]

As originally proposed, the Act would have defined a "'machine gun' [as] any weapon designed to shoot **automatically or semiautomatically twelve or more** shots without reloading." *See* H.R. 9066, 73d Cong., 2d Sess. (emphasis added).

In testimony presented to the House of Representatives, Committee on Ways and Means, Karl T. Frederick, President of the National Rifle Association, stated that this proposed definition was "wholly inadequate and unsatisfactory." Hearing, House of Representatives, Committee on Ways and Means, p. 39 (Apr. 16, 1934). In response to a request from a committee member for a more adequate definition, Mr. Frederick submitted that the definition be revised so as to read:

> A machine gun ... as used in this act means any firearm ... which **shoots automatically more than one shot without manual reloading, by a single function of the trigger**. [*Id.*, p. 40 (emphasis added).]

Mr. Frederick explained his proposal as follows: "The distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire **as long as there is any ammunition in the belt or in the magazine.**" *Id.* (emphasis added).

While Congress did not adopt Mr. Frederick's language in 1934, it did so in the Gun Control Act of 1968 and struck "semiautomatically" so that the definition would read:

> The term "machinegun" means any weapon which **shoots**, is designed to shoot, or can be readily be restored to shoot, **automatically more than one shot, without manual reloading, by a single function of the trigger**. [*See* Gun Control Act of 1968, Pub. L. 90-618, § 201, 82 Stat. 1213, 1231 (1968) (emphasis added).]

By this 1968 revision, Congress clearly required that to be a machinegun, a semiautomatic rifle had to be proven to fire "automatically." According to the Staples Court, this meant that the rifle must be shown to "shoot ... automatically," that is, fire and keep on firing, until the trigger was released or the ammunition was exhausted, consistent with the 1934 testimony of Mr. Frederick. Apparently unaware of this legislative history, including the 1968 amendment to the definition of machinegun, the court of appeals made no effort to ascertain the meaning of "automatically" in 1968. Had the court of appeals done so, it would have found that the Staples definition fits squarely within the meaning of "automatic" as applied to a firearm in the 1964 edition of Webster's Third International Dictionary, which reads:

> marked by use of either gas pressure or force of recoil and mechanical spring action for **ejecting** the empty cartridge case after the first shot,

> **loading** the next cartridge from the magazine, **firing, ejecting** the spent case, and **repeating** the above cycle **as long as the pressure on the trigger is maintained and there is ammunition in the magazine or other loading device**. [*Id.* 148 (emphasis added).]

The court of appeals also overlooked the fact that "[t]he word 'firearm' is used as a **term of art** in the NFA" and even ordinary words that appear in the definition — such as "make" — take on a meaning tailored to the purpose of the Act. *See* United States v. Thompson/Center Arms, 504 U.S. 505, 506-509 (1992) (emphasis added). Furthermore, the court of appeals appears to have ignored the Supreme Court's observation that "the statutory elements [of section 5845(b)] that criminalize otherwise innocent conduct [concern] features of a gun as **technically** described by the firearm registration Act." X-Citement, 513 U.S. at 72 (emphasis added).

C. The Staples Definition Is Supported by Numerous Authorities, Including the ATF Itself.

Olofson called the court of appeals' attention not only to the 1964 dictionary definition of "automatic,"[24] but also to numerous other authoritative definitions

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[24] *See* United States v. Olofson, Docket No. 08-2294 (7th Cir.), Brief of Appellant, p. 36.

that reinforce the accuracy of the Staples/Fleischli definition.[25]

In prosecuting Olofson, the government even violated its own official definitions of "automatic" in ATF Rul. 2004-5 (Aug. 18, 2004) and in ATF's Guide to Investigating Illegal Firearms Trafficking (Oct. 1997). Designed, *inter alia*, "to promote uniformity in the ... meanings of [illegal firearms trafficking] terminology" (*id.* at 9), the ATF Guide defines "automatic" or "fully automatic" as:

> An Autoloading action that will fire a succession of cartridges, so long as the trigger is depressed, or **until the ammunition supply is exhausted**. Automatic weapons are machineguns subject to the provisions of the National Firearms Act (NFA). [*Id.* at 100 (emphasis added).]

Indeed, ATF — the administrative agency commissioned to administer the federal firearms laws — formally adopted the Staples definition in support of its finding that a particular device, when added to a semiautomatic rifle, constitutes a machinegun because "when activated by a single pull of the trigger, [it] initiates an automatic firing cycle that continues **until** either the finger is released or **the ammunition supply is exhausted**." ATF Rul. 2006-2, 2-3 (Dec. 13, 2006) (emphasis added).

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[25] *See* United States v. Olofson, Docket No. 08-2294 (7th Cir.), Brief of Appellant, pp. 19, 36-37.

In his Firearms Deskbook (2008 Edition), author Stephen Halbrook quotes the definition of "automatic" that appears in the Glossary of the Association of Firearm and Toolmark Examiners (1985):

> A firearm design that feeds cartridges, fires and ejects cartridge cases **as long as the trigger is fully depressed and there are cartridges available in the feed system.** [*Id.* 2 as quoted in S. Halbrook, Firearms Law Deskbook, § 6.6, 440 (2008 ed.) (emphasis added).]

The court of appeals, however, chose to ignore ATF's official definition of "automatic," as well as other legal and firearms authorities. Clearly, the Staples definition is an accurate statement of the law, and the definition of the court of appeals below is not.

III. The Precise and Detailed Staples Definition of "Automatically" Is Necessary to Protect Second Amendment Rights.

In Staples, the government took the position that it need only prove that a defendant knew that a firearm was "dangerous" to obtain a conviction for violation of a federal law prohibiting possession of a machinegun. *Id.*, 511 U.S. at 608. This Court wisely rejected that argument on the ground that it would "'criminalize a broad range of apparently innocent conduct.'" *Id.* at 610. Instead, Staples crafted a mens rea rule that requires the government to prove, beyond a reasonable doubt, that a defendant must know the "facts that make his conduct illegal." *Id.* at 610, 619. In the case of a semi-automatic rifle that the government claims

to be a machinegun because it "shoot[s] ... automatically," Staples requires the government to prove that the weapon **actually does shoot automatically** — defined to be "more than one shot at the single pull of the trigger without manual reloading unless the trigger was released or the ammunition exhausted." *Id.* at 602 n.1.

Had the government adhered to the Staples precise and detailed description of what constitutes a machinegun, Olofson would never have been put in jeopardy of a felony conviction with up to 10 years' imprisonment. But the government chose not to adhere to Staples and, thus far, has successfully persuaded the courts that there is no need for precision and detail in defining the essential characteristics of a machinegun. Not only has that choice put Olofson in prison for conduct that, under Staples would be innocent, Olofson's conviction — if left standing — threatens countless other law-abiding citizens with becoming "felons-by-chance" should their semiautomatic weapons malfunction while exercising their right to keep and bear arms secured by the Second Amendment.

Olofson was convicted in early January 2008, just five months before this Court decided District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783 (2008), settling the question whether the Second Amendment secured an individual right. Heller ruled that the federal government may not prohibit a person from possessing a handgun in his own home for self-defense. Like Staples' and Olofson's semiautomatic rifles, semi-automatic handguns are complex machines

and can malfunction, causing the weapon to fire more than one shot at the single pull of the trigger. But malfunctions alone do not create machineguns out of lawful-to-own semiautomatic firearms. Only the precision and detail of a Staples-like definition of "automatically" can protect the constitutional right to own a semi-automatic handgun against arbitrary government classification, leading to seizure, prosecution, incarceration, and lifetime ban on firearm ownership. Under the long-standing rule, it is "incumbent upon [this Court] to read [a] statute to eliminate [serious constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress." *See* X-Citement Video, 513 U.S. at 78.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 28, 2009

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 08-2294

United States of America, Plaintiff-Appellee,
v.
David Olofson, Defendant-Appellant.

563 F.3d 652; 2009 U.S. App. LEXIS 9433

January 22, 2009, Argued
May 1, 2009, Decided

PRIOR HISTORY: [**1]
Appeal from the United States District Court for the Eastern District of Wisconsin. No. 06 CR 320--Charles N. Clevert, Jr., Judge.
United States v. Olofson, 2007 U.S. Dist. LEXIS 63553 (E.D. Wis., Aug. 28, 2007)

COUNSEL: For United States of America, Plaintiff - Appellee: Gregory J. Haanstad, Michelle L. Jacobs, Attorneys, Office of the United States Attorney, Milwaukee, WI.

For David Olofson, Defendant - Appellant: Robert Sanders, Winston Salem, NC; William J. Olson, Herbert W. Titus, William J. Olson, P.C., McLean, VA.

JUDGES: Before Manion and Kanne, Circuit Judges, and Kendall, District Judge.*

* Hon. Virginia M. Kendall, District Judge for the Northern District of Illinois, is sitting by designation.

OPINION

[*655] Manion, *Circuit Judge*. David Olofson was indicted for knowingly transferring a machinegun in violation of 18 U.S.C. § 922(o). A jury convicted Olofson of the charged offense following a two-day trial, and the district court sentenced him to thirty months' imprisonment. Olofson appeals his conviction. For the following reasons, we affirm.

I. Background

Robert Kiernicki saw a "for sale" advertisement for a Colt AR-15 rifle that David Olofson had posted at a gas station in New Berlin, Wisconsin. Kiernicki called Olofson at the phone number listed on the ad to inquire about the weapon. **[**2]** Olofson informed Kiernicki that the advertised gun was no longer available but agreed to order and assemble another Colt AR-15 for Kiernicki. In the meantime, Olofson loaned Kiernicki an AR-15[1] and hundreds of rounds of ammunition on four separate occasions. The selector switch on the borrowed AR-15 had three positions: one marked "fire," one marked "safety," and one that was unmarked. Olofson and Kiernicki discussed the unmarked setting on July 13, 2006, which was the fourth time that Olofson loaned Kiernicki the weapon. Olofson told Kiernicki that putting the selector switch in the unmarked position would enable the AR-15 to

fire a three-round burst with a single pull of the trigger, but the gun would then jam.

> 1 Four of the AR-15's fire control components were parts from M-16 rifles: the trigger, hammer, disconnector, and selector switch.

While at a shooting range that same day, Kiernicki (for the first time since using the gun) switched the AR-15 to the unmarked position and pulled the trigger; three or four rounds were discharged before the gun jammed. Kiernicki fired the weapon in that fashion several times, and each time it jammed after a short burst of three or four rounds. Police **[**3]** received a telephone complaint of automatic gunfire at the shooting range. When officers arrived at the range, they confiscated the AR-15 from Kiernicki. Kiernicki told the police that he had borrowed the gun from Olofson. Several days later, agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") interviewed Olofson while executing a search warrant at his home. During that conversation, Olofson acknowledged loaning the AR-15 to Kiernicki.

On December 5, 2006, a grand jury indicted Olofson for knowingly transferring a machinegun in violation of 18 U.S.C. § 922(*o*). Shortly before trial, Olofson filed a motion to compel the government to disclose evidence of the ATF's firearms testing procedures, correspondence between the ATF and the manufacturer of Olofson's AR-15 about the use of M-16 parts in AR-15 rifles, and the ATF's registration history of AR-15 rifles that contain M-16 parts. The district court denied that motion on the first day of trial after concluding that the information the

defendant was seeking was not exculpatory under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[*656] At trial, the government asked the district court to exclude Olofson's expert witness from the **[**4]** courtroom during the testimony of its firearms expert. Over Olofson's objection, the court granted the government's request. The government's expert testified that he used military-grade ammunition the first time he test-fired the AR-15 with the selector switch in the unmarked position and that the gun fired only one round. Later, using civilian-grade ammunition, he conducted two more test-fires of the weapon in the unmarked mode. In one of those tests, he held the trigger down and the gun fired all of its ammunition (twenty rounds) before stopping. He also emptied two twenty-round magazines in five- or ten-round bursts by depressing, holding, and releasing the trigger several times. The government's expert stated that such firing capabilities did not result from a "hammer-follow" malfunction but rather were intended features of the gun.

After the close of the evidence, the court used the definition of a "machinegun" from 26 U.S.C. § 5845(b) to instruct the jury and chose not to define the word "automatically" from that statute as the defendant had requested. Following deliberation, the jury returned a guilty verdict. Olofson then moved for a judgment of acquittal, arguing that the **[**5]** evidence presented at trial was insufficient to convict him of the charged offense and that the statutes under which he was prosecuted are unconstitutionally vague. The district court denied that motion and sentenced Olofson to

thirty months in prison. Olofson appeals, challenging his conviction on five grounds.

II. Discussion

A. Olofson's Proposed Jury Instruction

Title 18 U.S.C. § 922(*o*)(1) provides that, subject to exceptions not relevant here, "it shall be unlawful for any person to transfer or possess a machinegun." The applicable definition [2] of a "machinegun" is

> *any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.* The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (emphasis added). The district court instructed the jury using the **[**6]** first sentence of § 5845(b) but did not give any guidance on the meaning of the word "automatically." Olofson contends that the court inaccurately stated the law when it did not instruct the jury using the definition of "automatically" that derives from *Staples v. United*

States, 511 U.S. 600, 602 n.1, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994), and that we allegedly adopted in *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002). [3] Whether jury instructions correctly state the law is a matter we review de novo. *United States v. Thornton*, 539 F.3d 741, 745 (7th Cir. 2008). We **[*657]** will reverse only if the instructions viewed as a whole misled the jury to the defendant's prejudice. *Id.*

> 2 According to 18 U.S.C. § 921(a)(23), "[a]s used in this chapter[,] [t]he term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. [§] 5845(b))."
>
> 3 The defendant contends that if that instruction had been given, the jury could have found him not guilty because a malfunction was the reason the weapon stopped firing or, alternatively, was what caused the gun to fire more than one round with a single trigger pull.

In *Staples*, the defendant was convicted of possession of an unregistered machinegun. **[**7]** 511 U.S. at 603-04. At trial, the defendant insisted that he did not know that the weapon was capable of firing automatically (which is one of the features of a "machinegun" under § 5845(b)) and requested a jury instruction that the government must prove beyond a reasonable doubt that he knew the gun could fire in such a manner. *Id.* The district court refused to give the defendant's proposed instruction; instead, it gave an instruction that discounted the defendant's need for knowledge of every characteristic of the weapon that made it subject to regulation. *Id.* at 604. The Tenth

Circuit affirmed, holding that "the Government need not prove a defendant's knowledge of a weapon's physical properties to obtain a conviction." *Id.* In reversing, the Supreme Court held that the government was required to prove that the defendant knew of the characteristics of the gun that brought it within the ambit of the statute. *Id.* at 619.

At the beginning of its opinion, the Court quoted the statutory definition of "machinegun" from § 5845(b) and stated that "any fully automatic weapon is a 'firearm' within the meaning of the Act." *Id.* at 602. In a footnote, the Court then said the following:

> As used here, **[**8]** the terms "automatic" and "fully automatic" refer to a weapon that fires repeatedly with a single pull of the trigger. *That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted.* Such weapons are "machineguns" within the meaning of the Act.

Id. at n.1 (emphasis added).

The narrow holding from *Staples* is that *mens rea* was an element of the crime in question--i.e., that the government had to prove the defendant's knowledge of the features of the weapon (including automatic firing capability) that brought it within the proscriptive purview of the statute. *Id.* at 619. The precise definition of "automatically" was not at issue; therefore, the Court's discussion of the terms

"automatic" and "fully automatic" was immaterial to its holding. Indeed, the Court prefaced its explanation of the terms "automatic" and "fully automatic" with the phrase "[a]s used here." Thus, rather than interpreting a statute, the Court simply was providing a glossary for terms frequently appearing in the opinion. Therefore, *Staples* did not establish a requirement for district courts to instruct juries on the meaning of "automatically" **[**9]** from § 5845(b).

The same is true of our decision in *Fleischli*. In that case, the defendant was convicted of two counts of possession of machineguns in violation of 18 U.S.C. § 922(*o*)(1). *Fleischli*, 305 F.3d at 647. The defendant argued that a certain weapon was not a machinegun under § 5845(b) because it did not fire automatically and did not have a trigger. *Id.* at 654. Fleischli relied upon the definition of a semiautomatic rifle from 18 U.S.C. § 921(a)(28) to assert that a gun does not fire automatically "unless it uses a portion of the energy of a firing cartridge to extract the fired cartridge and chamber the next round without a separate pull of the trigger." *Id.* at 655. This court concluded that the gun's electronic on/off switch that initiated the firing sequence was a trigger and, having quoted from footnote one in *Staples*, stated that if the gun continued to fire until that switch was turned off or until the ammunition was exhausted, it was a machinegun. *Id.* at 655-56.

[*658] Olofson suggests that *Fleischli* obliged the district court to give his proffered instruction. True, in *Fleischli* we did borrow terminology from *Staples* in order to stamp out the appellant's "disingenuous argument"; **[**10]** *id.* at 655; however, we never

purported to be setting forth a comprehensive definition of "automatically" from § 5845(b). Indeed, we described the *Staples* footnote as merely "offer[ing] commonsense explanations" of the words "automatic" and "semiautomatic," which confirms that we did not consider that passage to be precedentially binding. As we explain below, a weapon does not have to continue to fire until its trigger is released or its ammunition is exhausted in order to qualify as a "machinegun" under § 5845(b). Therefore, Olofson's reliance on *Fleischli* for that proposition is misplaced.

We turn now to address what the word "automatically" means as it is used in the definition of "machinegun" in § 5845(b). "Statutory interpretation begins with the plain language of the statute." *United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008). We assume that the purpose of the statute is communicated by the ordinary meaning of the words Congress used; therefore, absent any clear indication of a contrary purpose, the plain language is conclusive. *Id.*

Again, "[t]he term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more **[**11]** than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). "The most relevant time for determining a statutory term's meaning" is the year of the provision's enactment. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994) (citing *Perrin v. United States*, 444 U.S. 37, 42-45, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979)). Therefore, we examine how "automatically" was commonly used and understood in

1934, the year in which the definition of "machinegun" became law with the passage of the National Firearms Act, Pub. L. 73-474, 48 Stat. 1236. A leading dictionary from 1934 tells us that "automatically" is the adverbial form of "automatic." WEBSTER'S NEW INTERNATIONAL DICTIONARY 187 (2d ed. 1934). The adjectival form of "automatic" is relevantly defined by that dictionary as "[h]aving a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation[.]" *Id.* Another contemporaneous dictionary similarly describes "automatic" as "[s]elf-acting under conditions fixed for it, going of itself." OXFORD ENGLISH DICTIONARY 574 (1933). [4] Thus defined, in § 5845(b) the adverb "automatically," as it modifies the verb "shoots," [5] delineates **[**12]** how the discharge of multiple rounds from a weapon occurs: as the result of a self-acting mechanism. That mechanism is one that is set in motion by a single function of the trigger and is accomplished without manual reloading.

> 4 Modern versions of those two dictionaries define "automatic" in the same terms. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 148 (2002); OXFORD ENGLISH DICTIONARY 805 (2d ed. 1989).
>
> 5 For the sake of efficiency and readability, we use the term "shoots" as shorthand for "shoots, is designed to shoot, or can be readily restored to shoot," unless otherwise indicated.

That interpretation clearly forecloses the argument that a weapon is not a machinegun merely because it *stopped firing* due to a malfunction; indeed, the reason a weapon ceased firing is not a matter with which §

5845(b) is concerned. Under that interpretation, however, a defendant can still argue that the *reason a gun fired more than one round* (with a single pull of **[*659]** the trigger without manual reloading) was due to a malfunction--i.e., the additional rounds fired resulted from a mishap rather than from a regular self-acting mechanism.

In light of the foregoing interpretation, we conclude that Olofson's proffered **[**13]** instruction was not an accurate statement of the law and that the district court properly rejected it. Moreover, the district court correctly used § 5845(b) to instruct the jury. As used in the statute, "automatically" comports with its ordinary modern meaning, *see* note 4, that is readily accessible to laypersons and is in no sense confusing; therefore, the district court was not required to define that term for the jury. *United States v. Castillo*, 406 F.3d 806, 821 (7th Cir. 2005); *Miller v. Neathery*, 52 F.3d 634, 638 (7th Cir. 1995).

B. Sufficiency of the Evidence

Olofson contends that the evidence presented at trial was insufficient to sustain his conviction. When a defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the government and will reverse the conviction only if no rational jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Castaldi*, 547 F.3d 699, 705 (7th Cir. 2008). In order to convict a person of violating 18 U.S.C. § 922(*o*)(1), the government must prove that 1) the defendant possessed or transferred a machinegun 2) with knowledge that the weapon had the characteristics

that bring **[**14]** it within the statutory definition of a machinegun. *United States v. McGiffen*, 267 F.3d 581, 590 (7th Cir. 2001).

Regarding the first element, Kiernicki testified that Olofson loaned him the AR-15 on four occasions, the last of which was July 13, 2006. An ATF agent also testified that Olofson admitted loaning the gun to Kiernicki. In addition, Kiernicki stated that the gun fired three or four rounds (on several occasions) with one pull of the trigger. The government's expert who test-fired the AR-15 stated that he exhausted a twenty-round magazine with one continuous depression of the trigger and emptied two additional twenty-round magazines in five-or ten-round bursts by intermittently depressing, holding, and releasing the trigger. He also declared that the weapon was intended to fire in such fashions and that a "hammer-follow" malfunction was not the cause. That evidence was adequate to permit a reasonable jury to find beyond a reasonable doubt that Olofson transferred a "machinegun" as defined by § 5845(b). Regarding the evidence on the knowledge element, Kiernicki said that Olofson told him "the three-round burst wouldn't work and that it would jam up." Kiernicki understood that **[**15]** statement to mean that "[t]hree rounds come out of it when you would pull the trigger" once. That testimony was sufficient for a reasonable jury to find beyond a reasonable doubt that the defendant knew that the AR-15, with a single pull of the trigger and without manual reloading, could shoot more than one round as the result of a self-acting mechanism. For these reasons, the defendant's challenge to the sufficiency of the evidence fails. [6]

6 The jury heard the testimony of the defendant's firearms expert about the AR-15's supposed malfunctioning and obviously rejected it; on a sufficiency-of-the-evidence challenge, we will not second-guess the jury's credibility determinations. *United States v. Brandt*, 546 F.3d 912, 917 (7th Cir. 2008).

C. Unconstitutional Vagueness

Olofson argues that 18 U.S.C. §§ 922(*o*) and 924(a)(2) are unconstitutionally vague. We review the constitutionality of a statute de novo. *United States v. Warner*, 498 F.3d 666, 697 (7th Cir. 2007). A statute is unconstitutionally vague if it **[*660]** either "1) does not provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or 2) fails to provide explicit standards to prevent arbitrary and **[**16]** discriminatory enforcement by those enforcing the statute." *United States v. Lim*, 444 F.3d 910, 915 (7th Cir. 2006). A vagueness challenge such as this one that does not implicate First Amendment freedoms is analyzed as applied to the specific facts of the case. *Id.*

To the extent Olofson contends that the statutes are fatally vague due to the way "automatically" is used in the incorporated definition of "machinegun" from § 5845(b), we disagree. We have already noted that the common meaning of "automatically" is readily known by laypersons and thus a specific instruction defining the term for the jury was unnecessary. Similarly, a person of ordinary intelligence would have understood the common meaning of the term--"as the result of a self-acting mechanism"--and thus would

have had fair warning of the relevant features of a weapon that § 5845(b) covers and that §§ 922(*o*) and 924(a)(2) regulate. Therefore, we reject Olofson's argument that §§ 922(*o*) and 924(a)(2) are unconstitutionally vague.[7]

> 7 Olofson does not present any cogent argument that §§ 922(*o*) and 924(a)(2) lack standards to prevent arbitrary or discriminatory enforcement.

D. **[**17]** *Exclusion of Olofson's Firearms Expert from the Courtroom*

The defendant also argues that the district court improperly granted the government's request to exclude his firearms expert (Len Savage) from the courtroom during the testimony of the government's firearms expert. Olofson contends that the presence of his expert during the testimony of the government's expert was essential to the presentation of his case.

Under Federal Rule of Evidence 615, "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." That rule does not authorize the exclusion of four categories of persons, including "a person whose presence is shown by a party to be essential to the presentation of the party's cause." FED. R. EVID. 615(3). As the party asserting a Rule 615(3) exception, Olofson bore the burden for showing that the exception applied. *Opus 3, Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628 (4th Cir. 1996); *United States v. Jackson*, 60 F.3d 128, 135 (2d Cir. 1995). We review for an abuse of discretion a district court's decision about the

essentiality of a witness's presence under Rule 615(3). **[**18]** *Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F.3d 912, 916 (9th Cir. 2005); *Opus 3*, 91 F.3d at 629; *Jackson*, 60 F.3d at 135-36.

At trial, Olofson presented two reasons for opposing the government's request to exclude Savage from the courtroom. First, he argued that because Federal Rule of Evidence 703 permits an expert to base his opinion upon facts or data made known to him at trial, Savage "should be allowed to be present to hear" the government expert's testimony. However, merely because Rule 703 contemplates that an expert may render an opinion based on facts or data made known at trial does not necessarily mean that an expert witness is exempt from a Rule 615 sequestration order. The text of Rule 615 plainly does not provide for such a per se exception; rather, Rule 615(3) confers discretion upon district courts to determine whether a given witness (of whatever stripe) is essential. We agree with the courts of appeals that have addressed the issue that Rule 703 is not an automatic exemption for expert witnesses from Rule 615 sequestration. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1374 **[*661]** (5th Cir. 1981); *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 630 (6th Cir. 1978); **[**19]** *see Opus 3*, 91 F.3d at 629. Therefore, the mere mention of Rule 703 by Olofson was insufficient to show that a Rule 615(3) exception was warranted.

Second, Olofson stated that he "would like to have Mr. Savage present to hear" the government expert's testimony on malfunctions so that he could "rebut or add information" if such testimony was incomplete or incorrect. While no precise incantation is required, we

doubt whether those statements advanced the argument that Savage's presence was essential under Rule 615(3). Olofson did not tell the district court (as he tells us on appeal) that Savage's presence was of critical import to his highly-technical defense that the AR-15 malfunctioned. Even assuming that he did make the argument, Olofson did not carry his burden of demonstrating essentiality. The defendant stated that Savage should be allowed to hear the government expert's testimony so that Savage could "rebut or add information" to any inaccurate testimony about malfunctions, but Olofson did not tell the district court why Savage's presence was necessary to achieve that end. Indeed, much of the data and malfunction information relied upon by the government's expert was already known **[**20]** to Savage due to the pre-trial disclosure of the government expert's reports, and Savage had the opportunity to respond to such materials during the defendant's case. Regarding any information which was not included in the reports but may have come into evidence during the testimony of the government's expert, Olofson had ample opportunity on direct examination for Savage to rebut, add to, or opine on the implications of such information by asking him to assume its existence.

Although it might have been helpful or desirable for Savage to hear the government expert's testimony, Olofson did not show that Savage's presence was *essential* to the presentation of his case. Therefore, the district court did not abuse its discretion in denying Savage a sequestration exemption under Rule 615(3).

E. Denial of Olofson's Discovery Requests

Prior to trial and pursuant to *Brady*, Olofson made a motion to compel the discovery of evidence he had requested but that the government had not produced. The defendant sought: 1) documentation of the procedures used by the ATF in testing the AR-15; 2) correspondence between the ATF and the manufacturer of the defendant's AR-15 concerning the use of M-16 parts in **[**21]** early AR-15 rifles; 3) information about changes in the ATF's registry of AR-15 rifles with M-16 components; and 4) documents pertaining to the ATF's refusal to register AR-15 rifles with M-16 parts. The district court denied the defendant's motion on the first day of trial after concluding that the information sought was not exculpatory. On appeal, Olofson claims that the district court committed prejudicial error in denying his *Brady* motion and that he therefore is entitled to a new trial. We review a district court's decision that evidence need not be produced under *Brady* for an abuse of discretion. *United States v. Dabney*, 498 F.3d 455, 459 (7th Cir. 2007).

Under *Brady*, the government is constrained to disclose evidence that is favorable to a defendant and material to either his guilt or punishment. *United States v. Fallon*, 348 F.3d 248, 251 (7th Cir. 2003). Favorable evidence includes both impeachment and exculpatory evidence. *United States v. Baker*, 453 F.3d 419, 422 (7th Cir. 2006). Even when the government has not disclosed such evidence, "strictly speaking, there is never a **[*662]** real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability **[**22]** that the suppressed evidence would have produced a different verdict."

Strickler v. Greene, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). "We have described this inquiry as 'materiality,' and stated that the demonstration of materiality is the key to obtaining a new trial where a defendant alleges a *Brady* violation." *Baker*, 453 F.3d at 422. Thus there are three parts to a *Brady* violation: 1) the disputed evidence must be favorable to the defendant, either because it is exculpatory or impeaching; 2) that evidence must have been suppressed by the government, either willfully or inadvertently; and 3) prejudice must have occurred. *Strickler*, 527 U.S. at 281-82.

Regarding the first non-disclosed item--the ATF's internal procedures for test-firing AR-15 rifles--Olofson says he wanted that information because "[f]ailure to follow those procedures by changing the type of ammunition in the second test could demonstrate that the tests had been manipulated to arrive at a reversal of the results of the first test." We do not see how that information could have exculpated Olofson; section 5845(b) does not require compliance with ATF test-fire procedures in order for a weapon to qualify as a machinegun, nor must the **[**23]** weapon fire any particular grade of ammunition or in the prohibited fashion during the first test-fire. Assuming that such evidence might have had some impeachment value, there was no *Brady* violation because the government's expert was otherwise sufficiently impeached. *United States v. Ervin*, 540 F.3d 623, 632 (7th Cir. 2008) ("*Brady* does not extend to 'evidence that impeaches an already thoroughly impeached witness.'" (quoting *United States v. Kozinski*, 16 F.3d 795, 819 (7th Cir. 1994))). Specifically, Olofson questioned the government's expert at length about ATF test-fire

procedures and the types of ammunition used in the tests. In addition, the government's expert admitted that the gun fired automatically more than one round with a single function of the trigger without manual reloading in the second test with civilian-grade rounds, but jammed in the first test with military-grade rounds. Even if the second test was inconsistent with ATF procedures, that fact would not undermine confidence in the outcome of the trial. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Therefore, the district court did not abuse its discretion in denying the defendant's motion to compel the production **[**24]** of that evidence.

With respect to his request for the ATF's correspondence with the manufacturer of his AR-15 concerning the use of M-16 parts in early AR-15 rifles, the defendant contends that evidence was exculpatory because it was relevant to his knowledge of whether or not his AR-15 was a machinegun. The district court denied Olofson's request on the first day of trial. At the sentencing hearing, the court revisited the issue; the court inspected a document *in camera*, stated that it was not exculpatory, and placed it under seal. We subsequently ordered that document to be unsealed. That evidence is a 1983 letter from the ATF to the manufacturer of the AR-15 in which the ATF advised the company that the installation of certain M-16 parts in AR-15 receivers may permit the weapon to fire automatically even though an automatic sear is not present. We agree with the district court that the document is not exculpatory: it has no bearing on Olofson's knowledge of whether his AR-15 was a machinegun. [8] The letter has **[*663]** no impeachment value either. Therefore, the district court did not abuse

its discretion in refusing to order the production of that evidence.

> 8 The government's theory of the **[**25]** case was that the AR-15 *functioned* as a machinegun, thus implicating the first sentence of § 5845(b)'s definition of the term. As discussed earlier, the district court instructed the jury using only that part of § 5845(b), and sufficient evidence of Olofson's knowledge of the AR-15's firing capacity was presented to convict him. Had the government attempted to prove that a part or combination of parts in the AR-15 made it a machinegun under the second sentence of § 5845(b), then perhaps evidence about the manufacturer's installation of M-16 parts in AR-15s would have been relevant to the defendant's knowledge of those parts in the weapon.

Lastly, Olofson argues that any documents relating to the ATF's change in registry or refusal to register AR-15 rifles with M-16 components were exculpatory because they could have been used to refute the government expert's testimony that the M-16 parts in Olofson's AR-15 made it a machinegun. But the government's expert did not testify that the AR-15 was a machinegun merely because it had M-16 parts; rather, the expert stated that the AR-15 *fired* the way it did due in part to the M-16 components. Regardless, like the district court, we do not see **[**26]** how the ATF's opinions or positions regarding the presence of M-16 parts in AR-15 rifles are the least bit germane to Olofson's conviction for knowingly transferring a machinegun. The district court did not abuse its

discretion in denying Olofson's motion to compel the government to produce that evidence.

III. Conclusion

In sum, the defendant's proffered jury instruction was not a correct statement of the law, and the district court properly rejected it. Furthermore, the evidence presented at trial was sufficient to sustain Olofson's conviction, and 18 U.S.C. §§ 922(*o*) and 924(a)(2) are not unconstitutionally vague as applied to the facts of this case. In addition, the district court did not abuse its discretion in either excluding the defendant's firearms expert from the courtroom during the government expert's testimony or in denying Olofson's motion to compel the production of evidence he had requested from the government. Accordingly, we AFFIRM Olofson's conviction.

Appendix B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 1, 2009

Before
Daniel A. Manion, *Circuit Judge*
Michael S. Kanne, *Circuit Judge*
Virginia M. Kendall, *District Judge**

No. 08-2294

United States of America,
Plaintiff-Appellee,

v.

David Olofson,
Defendant-Appellant.

Appeal from the United States
District Court for the Eastern
District of Wisconsin.
No. 06 CR 320
Charles N. Clevert, Jr., Judge.

ORDER

On consideration of the petition for rehearing en banc filed by defendant-appellant, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original

panel have voted to deny rehearing. The petition is therefore **DENIED**.

* Hon. Virginia M. Kendall, District Judge for the Northern District of Illinois, is sitting by designation.

Appendix C
District Court Judgment in a Criminal Case
[Sheet 1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
v.	USM Number: 08632-089
DAVID ROLAND OLOFSON	Case Number: 06-CR-320
	Brian Fahl and Brian P. Mullins
MAY 15 2008	Defendant's Attorneys
	Gregory J. Haanstad
	Assistant United States Attorney

THE DEFENDANT:

__ pleaded guilty on_____

__ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty by a jury as to the one-count Indictment on January 8, 2008, after a plea of not guilty.

The defendant is adjudicated guilty of the following offense:

Title & Section
18 U.S.C. §§ 922(o) and 924(a)(2)

Nature of Offense
Knowingly transferring a machine gun

Offense Ended
July 13, 2006

Count
One

The defendant is sentenced as provided in Pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

__ The defendant has been found not guilty on count(s) _____

__ Count(s) _____ of a _____ is/are dismissed upon the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of material changes in economic circumstances.

May 13, 2008
Date of Imposition of Judgement

/s/
Signature of Judicial Officer

C. N. Clevert, Jr.,
U. S. District Judge
Name & Title of Judicial Officer

5/15/2008
Date

Judgment in a Criminal Case
[Sheet 2 - Imprisonment]

Defendant: David Roland Olofson
Case Number: 06-CR-320

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons for a term of thirty (30) months imprisonment as to the one-count Indictment.

X The court makes the following recommendations to the Bureau of Prisons:
Placement at a facility as closes as possible to the E.D. of Wisconsin; and
Participation in the Inmate Financial Responsibility Program to facilitate payment of the Special Assessment

__ The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district.
__ at _____ □ a.m. □ p.m. on _____.
__ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
__ before 2 p.m. on

___ as notified by the United States Marshal.

X as notified by the Probation or Pretrial Services Office.

Appendix D

1. **18 U.S.C. § 921(a)(23)** provides:

(a)(23) The term "machinegun" has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).

2. **18 U.S.C. § 922(o)** provides:

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

3. **18 U.S.C. § 924(a)(2)** provides:

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

4. **26 U.S.C. § 5845(b)** provides:

(b) Machinegun
The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

Appendix E
United States District Court
Eastern District of Wisconsin

United States of America	Case No. 06-CR-320
v.	[Title 18, U.S.C., §
David R. Olofson	922(o) and 924(a)(2)]

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

1. On or about July 13, 2006, in the State and Eastern District of Wisconsin,

DAVID R. OLOFSON

knowingly transferred a machinegun.

2. The firearm involved in this offense was an Olympic Arms, .223 caliber SGW Rifle, model CAR-AR, bearing serial number F7079.

All in violation of Title 18, United States Code, Sections 922(o) and 924(a)(2).

A TRUE BILL:
/s/
FOREPERSON
Date: 12-5-06

/s/
STEVEN M. BISKUPIC
United States Attorney

Appendix F

Jury Instructions on Elements of Offense
Transcript of Trial (Volume 3)
January 8, 2008

Page 217, line 22 – page 218, line 6; page 219, line 11 – page 220, line 11

[Page 117]

The defendant is charged in the indictment as follows:

Count one.

The grand jury charges that: On or about July 13th, 2006, in the State and Eastern District of Wisconsin, David R. [Page 118] Olofson, knowingly transferred a machine gun.

The firearm involved in this offense was an Olympic Arms, .223 caliber SGW Rifle, model CAR-AR, bearing serial number F7079.

All in violation of Title 18, United States Code, 922(o) and 924(a)(2).

* * *

[Page 219]

The indictment charges that the offense was committed on or about July 13th, 2006. The government must prove that the offense happened

reasonably close to that date, but is not required to prove that the alleged offense happened on that exact date.

When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. Thus, to obtain a conviction, the government must prove that the defendant knew of the features of the gun that made it a machine gun as defined by federal law when he transferred the gun. You may not conclude that the defendant had knowledge if he was merely negligent in not discovering the truth.

A machine gun is any weapon which shoots, is designed [Page 220] to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.

To sustain the charge of transferring a machine gun, the government must prove the following propositions:

First, that the defendant knowingly transferred a machine gun; and, second, that the defendant knew, or was aware of, the essential characteristics of the firearm which made it a machine gun.

The term "transfer" includes selling, loaning, giving away, or otherwise disposing of.

Appendix G

Defense Request for Staples Instruction
Transcript of Final Pretrial Conference
January 3, 2008

Page 25, line 8 – page 27, line 12; page 34, line 15 – page 35, line 12

[Page 25]

THE COURT: Mr. Fahl?

MR. FAHL: Yes. Perhaps I can clarify. I don't believe that Mr. Savage is going to deny that under the restrictions of the test it fired multiple times. The question is whether or not multiple firings qualifies it as a machine gun. And there's a malfunction, whether or not this gun malfunctioned, and whether or not that malfunction could be brought about by using soft primered ammunition.

As to otherwise what else has been considered under ATF rulings and individual determinations in his experience of negotiating the placement or displacement of weapons on an NFTA registry, whether or not this gun, based on even the tests that have already been done, should be placed on that registry. It's his opinion that this is not a machine gun.

This is the same exact firearm -- same exact model of firearm that was issued in the case Staples vs. United States. And this issue was kind of litigated through the courts there, and I think there

was a similar concern about the nature of the [Page 26] firearm as to whether or not it should be classified as a firearm.

So, we can arrange, we have at this point a refundable ticket with Mr. Savage coming in on Sunday afternoon. I don't believe an extensive examination of the firearm would be needed. Something we could probably even do over a break on Monday before the expert testimony takes place, which I would hope it would alleviate some of Mr. Haanstad's concerns.

MR. HAANSTAD: Judge, Mr. Fahl says that some of the testimony, or one way in which this proposed expert testimony is going to be useful will be in determining whether multiple firings qualify a firearm as a machine gun. The statute provides that that's the case. That is, Title 26 USC Section 5845(b) provides that a machine gun is any weapon which shoots automatically more than one shot by a single function of the trigger. And that's the jury instruction that the defense has agreed to.

MR. FAHL: There's actually a comment, I noticed -- I just noticed now that we submitted some language from the Staples case which talks about firing until the trigger is released or until the magazine is emptied. That language is from Staples and then was adopted by the Seventh Circuit in the Fleischli case which I don't believe is necessarily the case. There was five-round bursts and then it jammed, in which case the firearm did not fire until

the trigger was released or until [Page 27] it emptied the magazine.

Then I believe that was the instruction that I submitted to Mr. Haanstad yesterday afternoon, but I just now noticed it wasn't in the amended final pretrial report.

THE COURT: You're saying that in the test firing here there was a jam.

MR. FAHL: I believe so. One of the test fires there was a jam.

THE COURT: All right.

MR. FAHL: And the factual witnesses from the people who were firing the weapon at the Berlin conservatory all talked about it firing at five-round bursts and then it jammed.

* * *

[Page 34] MR. FAHL: And I just want to make clear, I'm not sure what we stood on including in the definition. of machine gun, the definition of fully automatic and the trigger [Inaudible] firing until its completed. That's from footnote 1 in Staples vs. United States. We'd like that in there and I don't know if the government is conceding that should be in there or if they're taking a contrary position.

THE COURT: Mr. Haanstad?

MR. HAANSTAD: At this point the government's position is that it should not be in there. It's not required under the plain reading of the statute, but -- I have to say I haven't [Page 35] looked at footnote 1 of Staples. Like I said, I, for whatever reason, I apparently missed that reference in the proposed instructions that were sent by the defense. So I'll take another look and see whether I'm persuaded.

But at this point, again, it just seems to be inconsistent with the statutory definition which provides that a machine gun is any weapon that shoots more than one shot without manual reloading by a single function of the trigger. More than one shot obviously doesn't, on its face at least, require the complete emptying of the cartridge.

THE COURT: I'll look at Staples also. So we'll reserve judgment on that. Is there anything else?

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(2)

Supreme Court, U.S.
FILED
SEP 30 2009
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No. 09-256

IN THE
Supreme Court of the United States

DAVID R. OLOFSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF AMICUS CURIAE OF MONTANA SHOOTING SPORTS ASSOCIATION AND VIRGINIA CITIZENS DEFENSE LEAGUE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Montana Shooting Sports Association ("MSSA")(www.mtssa.org), is a non-profit corporation organized under the laws of the State of Montana and is an association of like-minded people. The purpose of MSSA is to "support and promote firearm safety, the shooting sports, hunting, firearm collecting, and personal protection using firearms, to provide education to its members concerning shooting, firearms, safety, hunting and the right to keep and bear arms, to own and or manage one or more shooting facilities for the use of its members and or others, to conduct such other activities as serves the needs of its members." MSSA has a genuine and viable interest in this litigation as its goals and its existence depends upon the protection of the rights and interests of its members, many of whom own semi-auto firearms and other firearms which are susceptible to the same malfunction at issue in this case.

The Virginia Citizens Defense League ("VCDL")(www.vcdl.org), is a non-profit Virginia corporation. VCDL's primary mission is to advocate for and to protect the right to keep and bear arms on behalf of its five-thousand members. A large number of VCDL's membership own semiautomatic firearms, any of which could malfunction at any time and

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties waived the requirement of notice of the intention to file this *amicus curiae* brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

unexpectedly fire more than one shot per trigger pull. That being the case, VCDL has a significant interest in the litigation at hand in protecting its membership from getting into serious legal trouble due to such a malfunction.

Each of the *amici curiae* was established, *inter alia*, for education purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the right of citizens to bear arms, and questions related to human and civil rights secured by law, including the defense of the right to own and use firearms, and related issues. In the past, each of the *amici* has conducted research on issues involving the U.S. Constitution and the constitutions of their respective states, and each has filed *amicus curiae* briefs in other federal litigation involving such issues.

It is hoped that the perspective of the *amici curiae* on the issues in the present case will be of assistance to the Court in deciding whether to grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The petition concerns the important question of the meaning of "automatically," as applied to a malfunctioning semiautomatic rifle, in a prosecution

for the knowing transfer of a machinegun (as defined in 26 U.S.C. section 5845(b)) in alleged violation of 18 U.S.C. sections 922(o) and 924(2).

If, as the government contends, any firearm that simply malfunctions and fires more than one shot per trigger pull is firing "automatically" and is thus a "machinegun" then millions of firearms owners are vulnerable to having their firearm suddenly become a "machinegun" whenever they fire it, since such a malfunction can occur at any time, for many reasons.

Those reasons include, but are not limited to: defective, worn, or broken parts, improper maintenance, improper headspace, and improper or defective ammunition, among other causes as will be shown below. All semiautomatic firearms are susceptible to such malfunctions, from lowly .22 rimfire rifles, to hunting and skeet shooting shotguns, to semi-auto hunting rifles and civilian semiautomatic rifles based on a military design, such as the AR-15 in this case.

In fact, not only are all semiautomatics susceptible to such malfunctions, so are double barrel shotguns and even revolvers, including single action six-shooters based on designs dating back to the 1800's or even earlier, with malfunctions causing those types of firearms to also fire more than one shot per each trigger pull, thus transforming Grand-Dad's old double barrel or single action six-shooter into a "machinegun' under the government's definition.

Such a sweeping standard not only stretches credibility and common sense, it also puts every gun owner of other than a pump shotgun or a single shot rifle at risk of becoming an instant "felon by chance" every time they pull the trigger, because of variables largely out of the shooter's control. Such is a recipe for shocking arbitrariness and exposure to criminal prosecution, potentially snaring even the most innocent of gun owners.

And if a gun owner has a firearm that malfunctions because of wear and use, or for other reasons, there is no remedy or safe harbor. There is no way the owner may divest himself of the firearm for repair or even disposal without being susceptible to prosecution for having illegally transferred a "machine gun." Nor is there a clear mechanism for the gun owner to be sure his firearm is no longer a "machinegun" after he has cleaned, repaired, or adjusted the firearm, or changed ammo to cure the problem. If someone else reinserts the right variable, such as incorrect ammunition (or manipulation of the selector switch as in this case), the malfunction could happen again, thus triggering a prosecution for transfer of a machinegun. In addition, a possession charge is also a possibility at any point for whoever knowingly "possesses" the "machinegun." There is no guarantee that if the gun owner contacts the police or the BATF immediately upon discovery of the "machinegun" that a prosecution will not follow.

ARGUMENT

I. THE COURT OF APPEALS' AFFIRMANCE OF OLOFSON'S CONVICTION, DESPITE THE CONFLICT WITH *STAPLES*, PLACES MILLIONS OF GUN OWNERS AT RISK OF BECOMING "FELONS-BY-CHANCE," IN DEROGATION OF THEIR RIGHT TO KEEP AND BEAR ARMS AND THEIR RIGHT TO DUE PROCESS, WHENEVER THEIR FIREARM HAPPENS TO MALFUNCTION AND AS A RESULT DISCHARGES MORE THAN ONE SHOT AFTER A SINGLE PULL OF THE TRIGGER.

A. The Courts Below Adopted a Definition of "Automatically" at Odds With Staples, Sweeping in Any and All Malfunctioning Semiautomatic Firearms That Fire More Than One Round Per Trigger Pull, Even Where the Firing is Out of Control of the Shooter, or Where the Firearm Jams and Stops Firing Before the Trigger is Released or the Firearm is Empty.

In *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994), this Court defined "automatically" as the firing of more than one shot with a single pull of the trigger where the shooter stops the firearm from firing by either releasing the trigger, or by consciously holding it back until the supply of ammunition in the firearm is exhausted:

> As used here, the terms "automatic" and "fully automatic" refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are "machineguns" within the meaning of the Act. We use the term "semi automatic" to designate a weapon that fires only one shot with each pull of the trigger, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired. [*Id.*]

Semiautomatic firearms are designed to fire only one shot per each trigger pull, whereas full-auto firearms are designed to fire more than one shot in sequence per each trigger pull, with the firearm continuing to fire until the trigger is released or until the ammunition is exhausted, as noted by this Court in *Staples*. Select-fire firearms give the user the choice of placing a selector switch in the "semi" or "full" position and thus setting the mode of possible fire as either semi-auto or as full-auto.

The above noted *Staples* definition of the terms "automatic" and "fully-automatic" reflect this Court's application of the essential mens rea requirement by contemplating only firearms that stop firing when the trigger is released, or at the choice of the shooter continue to fire because the trigger is not released, thus emptying the firearm. Such a definition would

not include firearms that malfunction and fire more than one shot because of that malfunction, with the malfunction beyond the control of the shooter, starting and stopping on its own accord, regardless of the wishes of the shooter. In this case, as the Petition notes, at 16, the evidence showed only that Olofson knew that his AR-15 could malfunction, suffering a hammer follow through, firing three or four shots at a single pull of the trigger without manual reloading and then jamming (stopping firing because of a mechanical stoppage related to the malfunction, rather than either the trigger being released or the ammunition being exhausted).

As the Petition notes, *Id.*, according to the prosecution's expansive view of "automatically," a malfunctioning rifle which jammed after shooting more than one shot at the single pull of the trigger is a machinegun, regardless of whether it stopped shooting before either the trigger was released or the ammunition was exhausted because of a malfunction. The prosecution argued at trial that, whether Olofson's AR-15 shot more than one shot at the single pull of the trigger as a result of a "hammer follow" malfunction "makes [no] difference under the statute [:] If you pull the trigger [of a firearm] once and it fires more than one round, **no matter what the cause**, it's a machine gun." Tr. 151, ll. 9-15 (emphasis added)

The court of appeals affirmed the rejection of the *Staples* standard and the use of the prosecution's greatly expanded definition, further defining "automatically" to include when a firearm shoots more

than one round per trigger pull "as the result of a self-acting mechanism."

If a malfunctioning firearm that discharges more than one round per trigger pull can be a "fully automatic" firearm, then all semiautomatic firearms (those designed to only fire one shot per trigger pull) of all types, whether originally of a military or civilian design/model, may at any time become a "fully automatic" since any number of malfunctions can cause the firing of more than one shot per trigger pull.

B. All Semiautomatic Firearms Are Susceptible to a Wide Variety of Malfunctions That Can Cause More Than One Round to Fire Per Trigger

Firearms that are designed to fire semiautomatic only are designed to fire only one shot per each function of the trigger (trigger pull). In such semiautomatic firearms, a disconnector is used to hold the hammer back after each shot, preventing the hammer from following the bolt forward as the bolt cycles, and requiring the trigger to be released and then pulled again before another round can be fired.

In contrast, firearms designed to fire full-auto are designed to fire more than one shot in sequence per each trigger pull, with the use of an auto sear, which releases the hammer once the bolt is completely in battery, but not requiring a release of the trigger, thus permitting the firearm to fire for as long as the trigger

is held to the rear without the requirement of releasing the trigger and pulling it again. If the trigger is not released before all the ammunition is expended, the shooter can empty the firearm with that one pull of the trigger. The rifle at issue in this case did not contain an auto-scar, and was designed by the manufacturer to fire only semi-auto. Select-fire firearms give the user the choice of placing a selector switch in the "semi" or "full" position and thus setting the mode of fire as semi-auto or as full-auto. Some models have a full-auto mode that allows only a certain number of rounds to be fired per trigger pull, such as the "three round burst" mode in some modern military weapons.

Even a rifle designed to fire semi-auto only can malfunction and fire more than one shot per trigger pull. This can happen to all semiauto firearms, of any design. As will be further explained below, rifles patterned after military designs are particularly susceptible to this malfunction, but even when a rifle is not a military design, it is possible. Such a malfunction can occur for a variety of reasons:

1. **Broken disconnector**. Semiautomatics (whether derived from military designs or not) have a part known as a "disconnector." This holds back the firing pin or hammer until the shooter releases the trigger, ensuring that only one shot is fired per trigger pull. But disconnectors may break, in which event a semiautomatic will begin firing more than one shot per trigger pull. This can happen to any semiautomatic firearm, including a youth's .22. This is known as a "slam

fire" or a "hammer follow through." *See* Wayne Faatz, "The Mysterious Slam-Fire," The American Rifleman, October 1983 ("American Rifleman").[2] As will be discussed below, the hardness of the primer can affect whether this happens, with a harder primer decreasing the likelihood and a softer primer increasing it. If the disconnector is broken and causes this malfunction, it is possible for the firearm to continue to fire for as long as the trigger is pulled to the rear. However it could also lead to personal injury or catastrophic failure, such as was experienced by the author of the American Rifleman article, depending on other variables of design, wear, and maintenance.

2. **Hammer following the bolt, aka "Hammer Follow Through."** As the American Rifleman put it, "this happens mostly in match rifles that have had the rear hammer hooks stoned [i.e., polished] excessively and non-symmetrically in achieving a crisp trigger pull. The sear falls, allowing the hammer to follow the bolt, firing the cartridge before the bolt is properly locked." This results in the same malfunction as the broken

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[2] Available online at:

http://www.mtssa.org/olofson/slamfire/index.html That article is distributed by commercial firearms manufacturer Springfield Armory to all of its customers who purchase its M1-A and M1-Garand semiautomatic rifles along with a warning on slam fires: http://www.mtssa.org/olofson/warning.html See also the online analysis of Fulton Armory at:

http://www.fulton-armory.com/SlamFire.htm and at: http://www.fulton-armory.com/SlamFire2.htm

disconnector. It could lead to the catastrophic failure of a sheered bolt and shattered stock discussed in the American Rifleman article, but may not, depending on the design and other variables.

This can also happen when the ammunition is weak, such as a "squib" load where the factory does not load the normal amount of powder, or where the powder has been exposed to oil, resulting in the bolt not cycling all the way back such that the hammer does not get caught on the sear, with the hammer simply going forward again, following the bolt and firing the next round.

3. **Frozen firing pin (caused by rust or debris).** When there is excessive dirt, fouling, or rust from corrosion (as occurs when using corrosive surplus ammunition) in the firing pin channel, this can cause the firing pin to stick in the forward position, causing the cartridge to fire upon being chambered. If this happens, the firearm will fire more than one shot with only one pull of the trigger (known to civilian shooters as a "string fire") and even if the shooter realizes what is happening and releases the trigger, the firearm will fire uncontrollably until empty, regardless of trigger position. Again, this can happen to any semi-auto of any design, including the youth's Ruger 10/22, Remington Model Nylon 66, or grandpa's old semi-auto hunting rifle or semi-auto shotgun such as a semi-auto Remington Model 1100. This can even happen upon merely

chambering a round, without touching the trigger, since the trigger is out of the equation.[3]

4. **Broken firing pin**. A broken firing pin that is now in two pieces can wedge forward, causing the same malfunction as a frozen firing pin, leading to more than one round being fired per trigger pull, with the most likely result being uncontrollable firing until empty even if the trigger is released. Both the frozen firing pin and broken firing pin malfunction have occurred even with semi-automatic handguns, causing the handgun to fire uncontrollably until empty even if the shooter releases the trigger. For example, this has happened to competition shooters firing Colt 1911 semi-automatic .45 handguns at Camp Perry

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[3] For example, see:

http://www.thehighroad.org/archive/index.php/t-4124.html

"I had a strange occurrence with my '43 SA Garand this weekend. I was shooting 1980 Danish Surplus (the stuff that comes in Enbloc clips). Twice, the rifle slamfired the second round in the clip (ie. Two round burst with the first pull of the trigger, the other six shot normally). The first time got my attention, but I had the sling wrapped securely around my arm and knew the rifle wasn't going anywhere, plus I figured it was probably a sensitive primer. Then about three clips later, it did it again. Also only on the second round in the clip. At that, I packed up the rifle and ammo and shot my Mosin for the duration. I took the rifle apart when I got home and found nothing apparently wrong. I pulled the firing pin expecting that maybe it was gummed up, but it was pretty clean and rattled freely in the bolt. Is there anything else I should look for? Could weak springs cause this? I have a Wolff spring kit that I plan on installing. I put about 600 rounds through the rifle before this with no problems at all. I do use grease at the proper lubrication points."

shooting matches. This can even happen upon merely chambering a round, without touching the trigger.

5. **Fouled bolt face**. Debris on the bolt face, in front of the firing pin, such as brass shavings from cartridge cases and primers, can act in the same manner as a frozen firing pin and cause the same malfunctions as discussed above, with the same result of a runaway gun emptying itself even if the shooter releases the trigger. As with the broken firing pin, this can also happen upon merely chambering a round, without touching the trigger.

6. **Improper headspace**. If the space between the bolt face and the cartridge chamber is too tight, then the forward travel of the bolt will be stopped by the base of the cartridge rather than the locking lug of the bolt, with the firing pin impacting the primer with increased force since there is an abrupt stop in less space, with the firing pin continuing forward under its own inertia. Depending on the mass of the firing pin and the sensitivity of the primer, it will result in the same malfunction as a broken firing pin, with the firearm firing uncontrollably, cycling as fast as it can, until empty. Improper headspace can be an error from the factory or can be caused by an improperly sized ammunition case, whether the ammunition is new from a factory or from an improper reload.

7. **Sensitive or improper primer**. As the 1983 American Rifleman article states, "A large pistol primer inadvertently used in a reload or a rifle primer not seated flush, could create the same situation."

8. **Cook-off.** This occurs when the barrel is hot enough, from rapid firing, to cause either the primer or the powder in a case to ignite, without even requiring the firing pin to impact the primer. In fact, if the barrel is hot enough, even if the firing pin is removed from the firearm the firearm could empty an entire magazine just from the heat alone. This is why most true machineguns fire from an open bolt, such as the BAR, the Thompson, Mac-10, the Uzi, the Sten, etc., just so they won't cook off. The M-16, the M-14, the MP-5 submachine gun, etc. are exceptions. Cook offs are possible with all closed bolt semiautomatics just as with full autos. This has happened with M1-Garands, and semi-auto M1A's, AR-15s, M1-Carbines, and many other semiautomatics. Such a string fire cook-off can be initiated simply by chambering a round in a hot firearm, or by firing the first shot with an intentional pull of the trigger, with the rest of the rounds firing because of the heat even if the trigger is released and not pulled again. Thus, if a shooter pulls the trigger once and a cook off then occurs firing more than one round, that too, according to the government, is a machinegun.

That such malfunctions are commonplace can be confirmed with a few online searches, locating discussion threads where shooters tell of their own experiences with firearms of all types malfunctioning and firing more than one round per trigger pull, to the consternation of the shooter, who then worries about legal repercussions.[4] And it is important to note that it happens even in rifles that were designed from the very beginning to be exclusively semiautomatic only, and not just to rifles derived from designs that were originally select fire. For example, the venerable old M1-Garand can and does malfunction and fire more than one shot per trigger pull, even though it was always exclusively a semiauto only design and was bought from the Civilian Marksmanship Program after being reconditioned.[5]

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[4] See http://www.thehighroad.org/archive/index.php/t-114401.html

"was test fireing a AR parts rifle,that I got at a show sat. luckey I use 1rd,2rd,etc method to test with,as rifle double fired at 2rds loaded. with 3rd loaded,it doubles and chambers the 3rd round.

this being my first AR,this was not a happy feeling. what do i need to look at,change out,before the knock on the door?" See also

http://www.thehighroad.org/archive/index.php/t-84754.html

"I have an ORF G1 FAL which I ordered in Feb and received in April. I am happy with the build time. I have not yet worked all the bugs out of the rifle though. Problems: 1. FSE trigger group allowed the hammer to chase the bolt forward occasionally causing the rifle to double. I fixed this problem by putting a DSA fire control group in my rifle ($60).

[5] See:

http://www.odcmp.org/new_forum/topic.asp?TOPIC_ID=75333&SearchTerms=doubling

"I carefully greased all the wear points in the action, op rod, bolt

C. Semi-auto Rifles Based on Military Design Are More Susceptible to Malfunctions That Can Cause More Than One Round to Fire Per Trigger Pull.

1. Free floating firing Pins Increase the Risk of Malfunction Causing More than One Shot to Fire With Only One Pull of the Trigger.

Military primers are harder - the hardest primers - because military firing pins are free-floating rather than being spring retained. When a military firearm is fired, the firing pin stays forward within the bolt as the bolt travels to the rear, ejecting the spent case, and the firing pin does not reset into its rearward, ready to fire position until it impacts the primer on the next unfired round, which the bolt strips out of the magazine and chambers as the bolt returns forward. The firing pin is physically pushed back by the primer as the round is chambered. If one were to pull back the bolt handle and eject that round without firing it, there would be a visible impact dent on the primer, known as a light firing pin strike, from the firing pin hitting the primer as the round is chambered. (See the photo of the two cases, one with the light firing pin

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and even including the sear (perhaps this was my mistake). I went to the Range today, loaded a 2-round enbloc, and proceeded to "safely" fire it down range on a bench from an arms length. Both rounds fired almost instaneously and "ping" the enbloc ejected. At the least, I was taken back, scared and quite cautious. I have other M1's and never had this occur."

strike, in the American Rifleman article, note 1). That design has been used in military firearms, and also their civilian derivatives and counterparts, for many decades, such as with the M1-Garand, designed in the 1930s. The rifle at issue in this case, like dozens of other models on the market, uses a free-floating firing pin.

When the proper ammunition is used, using harder, military specification primers, this is not an issue, as the rifle will not fire even with that light primer strike. The alternative to a free-floating design is to use a spring, but military designs do not use a spring since that would add one more part susceptible to breakage or clogging with dirt, and thus less reliable.

With free-floating firing pins, even if all the mechanical parts of the rifle are in perfect operating condition and well maintained, and the rifle cycles normally, if the ammunition used has a light primer, it can possibly cause the same malfunction as all of the above, with the first and only trigger pull setting off a chain reaction of all of the light primer rounds firing one after another, uncontrollably, even if the shooter releases the trigger. And that is why some shooters of AR-15 type rifles will replace the original firing pin with a titanium version which is lighter and thus has less mass, reducing the impact on the primer and therefor reducing the risk of this malfunction.[6]

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[6] http://www.fulton-armory.com/QM1.htm

2. The Use of Some M-16 Parts in Commercial Semiautomatic Rifles Increases the Risk of Malfunction Leading to More Than One Round Being Discharged Per Trigger Pull

Since as early as 1983, it was widely known by the firearms manufacturers, wholesalers, and dealers that when a rifle has certain M-16 internal parts, while such was not ipso facto illegal, it did make a malfunction leading to multiple shots per trigger pull more likely even when an automatic sear is not present. See the 1983 warning letter to SGW/Olympic Arms from William T. Drake, Assistant Director, Regulatory Enforcement, BATF, which was submitted to the court below as Exhibit 14.[7]

Then, in 1986, Stephen E. Higgins, Director of the BATF, sent out an "Open Letter to Licensees and Others Concerned" warning of "possible Gun Control Act violations in which you could inadvertently become involved."[8] The letter warned that "many of these rifles [patterned after military rifles] using less than the five M16 parts listed above [M16 bolt carrier, hammer, trigger, disconnector, and selector] also will shoot automatically by manipulation of the selector" which is precisely what happened with Olofson's rifle.

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[7] Available online at http://www.mtssa.org/olofson/treasury.html

[8] http://www.mtssa.org/olofson/BATF.html

That same letter also stated that "these rifles may pose a safety hazard in that they may fire automatically without the user being aware that the weapon will fire more than one shot with a single pull of the trigger." *Id.* And yet, the rifle that Olofson owned came from the SGW/Olympic Arms factory with those parts, making it possible to place the selector in between safe and fire, and thus cause a hammer follow through malfunction, which is precisely the malfunction at issue in this case.

Regardless of the cause, with the government's interpretation of what is full-auto meaning merely discharging more than one round per trigger pull, regardless of the cause(s), every owner of a semi-automatic firearm, be it a lowly child's .22 rifle, a hunting or skeet shotgun, a hunting rifle, or a semi-automatic rifle patterned after a military rifle, such as in this case, is vulnerable to having his or her firearm fire more than one shot due to any of the above noted variables at any time. This can happen even when the owner takes all possible precautions, since breakage or ammunition failure can occur at any time. Thus, under the government's interpretation of "full auto" all owners of semi-auto firearms are at risk of being transformed into "instant felons" if the firearm malfunctions or if the ammunition is faulty. This risk is present every time the trigger is pulled and every time the firearm is chambered.

D. Malfunctions That Cause More Than One Round To Fire Can Also Occur With Old Double Barrel Shotguns, Thus Making Them "Machineguns" Under the Government's Wildly Expanded Definition.

A firearm does not have to even be semiautomatic in design or function to have a malfunction occur which causes more than one shot to be fired with only one trigger pull. For example, a double barrel shotgun, a design dating back to the 1800's, when it was used to hunt on the frontier and to guard stage coaches, can have a malfunction causing both barrels to discharge with one trigger pull, and thus meets the government's definition of a "machinegun" since the malfunctioning double barrel shotgun has fired more than one round with only one trigger pull. As with the above malfunctions, this can be caused by wear, such as a worn spring or sear, improper maintenance, corrosion, dirt, etc. That, according to the government's definition, an old, worn out, or dirty double barrel shotgun that malfunctions is a"machinegun" serves to illustrate how untenable and problematic it is to allow the government to abandon the *Staples* standard and adopt a non-standard that permits such an absurdity.

E. Even a Single Action Revolver Can Malfunction and Fire Two or More Rounds With Only One Trigger Pull, Thus Becoming A Machinegun Under the Government's Absurd Standard

In addition, an old single action revolver, a design dating back to the Old West, can also malfunction and fire more than one round per trigger pull, and could even fire all six chambers with one trigger pull. This can happen if the ammunition used has primers that are too thin, such that the firing pin, which is on the hammer on single actions, pierces the primer, causing propellant gases from the discharge to blow back out of the hole in the primer at the rear of the case, propelling the hammer back, which then comes back forward as the cylinder automatically turns, bringing the next cartridge in line to be fired, and once again, the firing pin on the hammer pierces the too-thin primer on the next case, and again propellant gases blow back out of the hole in the primer, propelling the hammer back, and this will continue on through all of the rounds in the revolver's cylinder for as long as the trigger is depressed, just like a kid fanning the hammer on a cap gun in imitation of an Old West gunfighter. This differs from the malfunctions listed above since the shooter can stop it by releasing the trigger, but it still allows for more than one shot per trigger pull. Old West trick shooters did this intentionally by using thin primers. It can also be done by sharpening the firing pin.

Further, this can happen even with older revolvers, such as those used prior to the Civil War, which required individual percussion caps to be installed on nipples for each chamber in the revolver cylinder. Igniting powder in one chamber could be blown into others causing double fire or a chain fire, where all cylinders ignite uncontrollably, and all with only one pull of the trigger.

Such malfunctions can occur even with newly manufactured versions of old designs, that are not considered to be firearms under current legal definitions. For example with a newly manufactured Ruger Old Army cap and ball pistol, if you use the wrong size percussion cap, such as a #12 cap rather than the #10 cap it is designed to use, it will almost certainly double fire or chain fire, discharging two or more rounds with one pull of the trigger, because the cap that is struck is too loose, allowing a space for the fire to get by and into the other chambers.

To take the absurdity of the government's position to its logical conclusion, consider the Snaphunce revolver, designed in the late 17th Century, which where especially prone to chain fires.[9] Thus, according to the government's argument, you could have a weapon that was manufactured in the 17th Century, a full two hundred year before the real machinegun was invented, which would nonetheless be a "machinegun" just because it malfunctioned, if it were considered a firearm at all under the law.

It is only because such ancient weapons are not considered to be firearms under current law that the government is saved from the completely absurd spectacle of a 17th Century artifact being transformed into a "machine gun" because it malfunctions. The government is certainly not saved from that embarrassment by having a standard that is connected

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[9] http://guns.wikia.com/wiki/Revolver

to any common sense definition of what is actually a machinegun.

As those ancient weapons show, there is already a very grey area in the law regarding what is and is not even a firearm, with the law making some rather arbitrary determinations based on dates of manufacture and obsolescence of technology.[10] The government's nebulous definition of what is fully automatic and what is a machinegun only makes the legal landscape all the more murky and uncertain.

Perhaps most perverse is the fact that if a gun owner has a firearm that malfunctions because of wear, fouling, broken parts, or for any of the reasons shown above, there is no remedy or safe harbor. There is no way the owner may divest himself of the firearm for repair or even disposal without being susceptible to prosecution for having illegally transferred a "machine gun." Nor is there a clear mechanism for the gun owner to be sure his firearm is no longer a "machinegun" after he has cleaned, repaired, or adjusted the firearm, or had that service done by a gunsmith. changed ammo to cure the problem. For example, a Korean War era veteran could be out shooting his cherished 1950's era M1-Garand, have a double, where two rounds fire with one trigger pull. If that shooter then corrects the problem, and then gives the rifle to his son or grandson, and it happens again, can he be prosecuted? He "knew" it was a

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[10]http://firearmscoalition.org/new/index.php?option=com_content&task=view&id=403&Itemid=1

"machinegun" according to the government's standard. If it happens again, or if it can be made to happen again, such as by the use of soft primer ammunition, he would be as vulnerable to prosecution as Olofson was. Regardless of how conscientious the shooter, if someone else gains even temporary possession and reinserts the right variable, such as incorrect ammunition (or manipulation of the selector switch as in this case), the malfunction could happen again, thus triggering a prosecution for transfer of a machinegun. In addition, a possession charge is also a possibility at any point for whoever knowingly "possesses" the "machinegun," whether it is the original shooter or the person who later possesses the firearm if warned of the possible danger. Once warned by the transferor, the transferee is now "knowingly" in possession - but of what? A gun that malfunctions once in a while or a machinegun? Only the government can say for sure. Further, at any stage, there is no guarantee that if the gun owner contacts the police or the BATF immediately upon discovery of the malfunction/"machinegun" that a prosecution will not follow. The government may argue that it would not prosecute an "innocent" owner, transferor, or purchaser, but if it will prosecute Olofson, who won't it prosecute? People should not have to rely on the kindness, sense of justice, or common sense of government agents to keep themselves out of prison.

This Court should grant the Petition so that it can return the lower courts to the clear, common sense, practical, and rights supporting standard of *Staples*.

CONCLUSION

In granting certiorari in this case, this Court could, and should, simultaneously place the lower federal courts under the constraint of precedent, and reaffirm the clear and practical *Staples* standard that will avoid absurdity and injustice. For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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